# United States Court of Appeals for the Second Circuit



## APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

76-6031

WALTER WOE (a pseudonym), by his mother and guardian, WILMA WOE (a pseudonym), on behalf of themselves and all others similarly situated,

Appellants-Plaintiffs,

- v. -

DAVID MATHEWS, individually and as Secretary of the United States Department of Health, Education and Welfare; THE UNITED STATES OF AMERICA; HUGH
L. CAREY, individually and as Governor of the State of New York; LAWRENCE
L. KOLB, M.D., individually and as Commissioner of Department of Mental Hygiene of the State of New York;
MORTON B. WALLACH, M.D., individually and as Director of Brooklyn State
Hospital; and, THE STATE OF NEW YORK,

Appellees-Defendants.

DOCKET NO. 76-6031



### APPENDICES TO APPELLANTS' BRIEF

MORTON BIRNBAUM Attorney for Appellants Office and Post Office Address 225 Tompkins Avenue Brooklyn, New York 11216

Tel. No. (212) 852-5252

APPENDICES TO APPELLANTS' BRIEF

- A. Index on Appeal
- B. Amended Complaint in Woe, et al. v.

  Mathews, et al., U.S.D.C., E.D.N.Y.,

  Civ. No. 75 C 1029
- C. District Court's Memorandum and Order in Woe v. Mathews, ibid., 408 F. Supp. 419 (1976)
- D. Amended Complaint in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973).
- E. Motion of November 17, 1975, inter alia, to join as individual and class defendants, New York Supreme Court Justices, etc.
- F. Motion of December 8, 1975 to join as defendants, Joint Commission on Accreditation of Hospitals, etc.

### APPENDICES TO APPELLANTS' BRIEF

- A. Index on Appeal
- B. Amended Complaint in Woe, et al. v.

  Mathews, et al., U.S.D.C., E.D.N.Y.,

  Civ. No. 75 C 1029
- C. District Court's Memorandum and Order in Woe v. Mathews, ibid., 408 F. Supp. 419 (1976)
- D. Amended Complaint in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973).
- E. Motion of November 17, 1975, inter alia, to join as individual and class defendants, New York Supreme Court Justices, etc.
- F. Motion of December 8, 1975 to join as defendants, Joint Commission on Accreditation of Hospitals, etc.

Appendix 1

WALTER WOE (a pseudonym), by his mother and guardian, WILMA WOE (a pseudonym), on behalf of themselves and all others similarly situated,

### Plaintiffs,

### - against -

75 Civ. 1029

DAVIC MATHEWS, individually and as Secretary of the United States Department of Health, Education and Welfare; THE UNITED STATES OF AMERICA; HUGH L. CAREY, individually and as Governor of the State of New York; LAWRENCE L. KOLE, M.D., individually and as Commissioner of Department of Mental Hygiene of the State of New York; MORTON B. WALLACH, M.D., individually and as Director of Brooklyn State Hospital; and THE STATE OF NEW YORK,

### Defendants.

#### INDEX ON APPEAL

	INDEX ON APPEAL		
	Photocopy of docket entries	A-E	
	Order allowing complaint to be filed in forma pauperis. (Sealed)	1	
	Summons, additional summons and complaint.	2	
	Order permitting use of pseudonyms and sealing order.		
	Memorandum of law in opposition to plaintiffs' motion to determine the class.	3	
	Order to show cause for an order to maintain case as a class action.	4	
	Memorandum of law in support of plaintiffs' motion to maintain this lawsuit as a class action.	5	
	Second and additional memorandum of law in support of plaintiffs' motion to maintain this lawsuit as a class action.	6	
I	Memorandum order denying motion to certify class actionithout prejudice to renewal in the event a three-judge court is con-	7	
	vened.	8	A-1

Demand pursuant to local Civil Rule One.	9
Memorandum of law in opposition to plaintiffs' application for a class action certification.	10
Motion for reconsideration and reargument of decision denying plaintiffs' motion for class action certification.	11
Notice of appeal.	12
Additional summons.	13
Amended complaint for declaratory judgements, etc	. 14
State defendants' motion for an order pursuant to Rule 12.	15
State defendants' memorandum of law in support of motion to dismiss.	16
Motion to clarify further proceedings under Civil Rule One.	17
Order extending time for defendants to answer.	18
Motion to reschedule reargument of denying class action.	19
State defendants' additional motion to dismiss.	20
Memorandum of law in support of state defendants motion to dismiss amended complaint.	21
Federal defendants' motion for an order dismissi plaintiffs'amended complaint.	.ng 22
Federal defendants' memorandum of law.	23
Additional summons.	24
Order extending time to answer the complaint and amended complaint.	25
Order of discontinuance of appeal.	26
Memorandum of law of plaintiffs in opposition to defendants' motion to dismiss.	27
Supplemental summons returned.	28
Omitted.	29
Memorandum and order denying plaintiffs' motion for a temporary restraining order.	30
Plaintiffs' notice of appeal.	31
Order permitting use of pseudonym, Frank Foe,	
and sealing order.	32

State defendants' memorandum of law.	33
Notice of motion to further amend amended complaint	34
Stipulation of discontinuance of appeal.	35
Plaintiffs' memorandum in further opposition to motions to dismiss amended complaint.	36
Memorandum and order dismissing the complaint as to the federal defendants, denying state defendants' motion to dismiss as to them, denying plaintiffs' motion to amend complaint and certifying a limited class action.	37
Plaintiffs' notice of appeal.	38
Order extending state defendants' time to answer.	39
Notice of motion by state defendants for reconsideration of class action designation (missing).	40
Memorandum of law in support of state defendants motion. (missing)	41
Letter from Morton Birnbaum to: Louis Thrasher, Esq., Director Special Litigation Section Civil Rights Division United States Department of Justice	42
Answer of state defendants.	43
Letter to Judge Neaher from Assistant US Attorney Cyril Hyman in response to the "Second and Additional Memorandum of Law in Support of Plaintiffs' Motion to Maintain this Lawsuit as a Class Action.	44
Letter to Judge Neaher from New York State Attorney General.	45
Copy of letter to Commissioner Berger from Regional Commissioner Smith regarding Pilgrim Psychiatric Center.	46
Letter to Judge Neaher from Morton Birnbaum, plaintiffs' attorney, submitting further objective data to support plaintiffs' claims.	47
Letter to Judge Neaher from Morton Birnbaum regarding filing of similar action, Yetta Yoe et al v Lawrence C. Kolb.	48
Letter to Pro Se Clerk regarding proposed ex parte order for permission to use pseudonym, Frank Foe.	49
Letter to Judge Neaher regarding oral argument of same date from Morton Birnbaum.	50

Copy of letter to Judge Neager from Morton Birnbaum regarding plaintiffs' third claim for relief in their amended complaint.	51
Copy of letter to Judge Neaher from Morton Birnbaum regarding matters material to the issues.	52
Copy of letter to Clerk of Court regarding transference of similar Yetta Yoe case to EDNY from New York State Attorney General's Office.	53
Memorandum in opposition to plaintiffs' motion to determine the class.	54
Supplemental memorandum of law in opposition to plaintiffs' motion to determine the class.	55
Unsigned order to show cause and temporary restraining order upon the annexed affidavit of Morton Birnbaum.	56
Unsigned order to show cause and temporary restraining order upon the annexed affidavit of Morton Birnbaum.	57
Memorandum of law in support of plaintiffs' motions for a temporary restraining order.	58
Unsigned order allowing use of pseudonyms for additional proposed plaintiffs and sealing this order.	59
Copy of letter from Lawrence Kolb to David Mathews.	60
Clerk's Certificate.	61

### EXHIBITS

- A. Birnbaum, M.: Some Remarks on The "Right to Treatment," 23 ALA. L. REV. 623, 1971.
- B. Birnbaum, M.: The Right to Treatment: Some Comments on Its Development, IN AYD, F.J., MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE, at 97 (1974).
- C. Amended complaint in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973).

- D. Amicus curiae brief of American Medical Association
- E. Amicus curiae brief of American Nursing Association
- F. Amicus curiae brief of American Orthopsychiatric Association
- G. Amicus curiae brief of American Fsychiatric Association
- H. Amicus curiae brief of American Public Health Association
- I. Amicus curiae brief of Association of Black Psychologists
- J. Amicus curiae brief of Black Psychiatrists of America
- K. Amicus curiae brief of National Medical Association
- L. Amicus curaae brief of Congress of Racial Equality
- M. Amicus curiae brief of National Association of the Advancement of Colored People
- N. Amicus curiae brief of National Black Feminist Organization
- O. Amicus curiae brief of National Conference of Black Lawyers
- P. Amicus curaie brief of National Urban League
- Q. Amicus curiae brief of the State of Ohio
- R. Amicus curiae brief of the State of Oregon
- S. Amicus curiae brief of the State of Pennsylvania
- T. Amicus curiae brief of National Health Law Program

A-5

- DICKET DEM PORTER FILING DA JUDGE. YR. NUMBER MO. DAY 440 0719 DEFENDANTS PLAINTIFFS WALTER WOE, et al H.E.W., et al CASPAR W. WEINBERGER, individually

WALTER WOE '(a pseudonym), by his mother and guardian, WILMA WOE (a pseudonym), on behalf of themselves and all others similarly situated

and as Secretary of the United States Department of Health, Education and Welfare; THE UNITED STATES OF AMERICA; HUGH L. CAREY, individually and as Governor of the State of New York; LAWRENCE KOLB, M.D., individually and as Commissioner of Department of Mental Hygiene of the State of New York; MORTON B. WALLACH, MD. individually and as Director of Brooklyn State Hospital: and. THE STATE OF NEW YORK

CAUSE

42 U.S.C. § 1396 28 U.S.C. § 1343 CIVIL RIGHTS

DECLARE PROVISIONS OF SOCIAL SECURITY ACT UNCONSTITUTIONAL WHICH EXECUDES STATE MENTAL HOSPITAL PATIENTS FROM MEDICAID BENEFITS.

#### **ATTORNEYS**

For PLAINTIFFS: Mgrton Birnbaum 225 Tompkins Avenue Brooklyn, N.Y. 11216

Paul J. Clifford 120 Broadway N.Y:, N.Y. 10005

FOR STATE DEFTS: Louis J. Lefkowitz Two World Trade Cth

NYC 10047 433-4178

Page "A" Appendix E

X CHECK HERE IF CASE WAS		FILING FEES PAID		STA	TISTICAL CARDS
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
FILEDIN		<u>-                                    </u>		JS-5	7.

1	1 TO	52	0		TI	3	00							
	É	0		1	Ji.	V	4	Ţ.	ЮĖ	vs.	H.E.W.,	et	a	
-	Τ.			2				٠	,		PROCEEDIN	ce		1

DATE	NR.	PROCEEDINGS BEST COPY AVAI	LABLE
5-27-75		By BRAMWELL, J Order dtd 6-27-75 allowing complaint to be file	d
5.07 75		In forma pauperis filed.	(1)
5-27-75 5-27-75		Complaint filed. Summons and additional summons issued. By NEAHER, J Order dtd 6-27-75 permitting use of pseudonyms	(2)
		and to seal this order filed	(2)
5=27=75		Documents 1 & 3 sealed & placed in vault as directed. My	(3)
7-15-75		Memorandum of law in opposition to pittis, motion to determine	
	1	the class filed.	(4)
7-17-75		By NEAHER, J Order to show cause dtd 7-8-75 for an order to	
7-17-75		maintain casesas a class action, ret 7-18-75 at 2 P.M. filed. Memorandum of Law in support of pltffs; motion to maintain	(5)
1-11-13		this lawsuit as a class action filed.	(6)
7-18-75		Before NEAHER, JCase called. Motion re Rule 23 argued. Decision	
. 20 ,5		reserved. Additional papers to be submitted.	
7/25/75		Second and Additional Memorandum of Law in Support of Pltff's Mo	tion
room man		to Maintain this Lawsuit as a Class Action filed.	(7)
7-31-75		By NEAHER, J Memorandum order dtd 7-31-75denving motion to	(,,
		certify class action without prejudice to renewal in the event a	
0 / ==		three-judge court is convened filed. (copies mailed to attys)	(8)
8-4-75		Demand pursuant to local civil rule one filed.	(9)
3-7-75		Defts Cary, Kolb, Wallach and the State of New York's Memorandum	
		of Law in opposition to pltffs application for a class action certification filed.	
0			(10)
3-11-75		Notice of motion ret. 9-12-75 for reconsideration and reargument	
		decision denying pltffs' motion for class action certification fi	led(11)
3-11-75		NOTICE OF APPEAL FILED. (Duplicate mailed to C of A with copies	
11. 75		of docket entries. jn.) (C&D mailed to pltffs' atty)	(12)
3-14-75		Additional summons ret and filed/HEW served by (certified mail.	
		Deft Hugh L. Carey service made by certified mail State of NY,	(12)
3-15-75		Lawrence C. Kolb & Morton B. Wallach served personally.  Amended complaint for declaratory jdugments etc filed.	(13)
8-20-75		Notice of motion ret 9-26-75 for an order pursuant to Rule 12	(14)
20-13	1	filed.	(15)
8-20-75	1	memorandum of Law in support of motion to dismissifiled.	(16)
8-20-75		Notice of motion to clarify further proceedings under civil	
		Rule One filed.	(17)
3/22/75		By NEAHER, J Order dated 8/21/75 filed that the time of the de-	ft
		to answer the complaint is extended to Sept. 15, 1975	(18)
9-5-75		Notice of rescheduling of motion to reargue decision denying	
		class action to 9-19-75 filed.	(19)
9/13/75	-	Notice of Motion, ret. 9/26/75 filed re: N to dismiss.etc.	(20)
			(20)
9/13/75		Memorandum of Law in Support of Etate Deft's Motion to Dismiss	(03)
9-15-75		Amended Complaint filed.	(21)
/-13-/3		Notice of motion ret 9-26-75 for an order dismissing pltffs amended complaint filed.	(22)
9-15-75		Memorandum of Law filed.	(23)
9-19-75	an index Street . A.	Summons filed.	(24)
9-19-75		Supplemental summons issued.	(- /
9-22-75		By NEAHER, J Order dtd 9-19-75 extending time to answer the	
		complaint & amended complaint to 9-26-75 filed.	(25)
9/25/75		By NEAHER, J Order of Discontina Restated 9/24/75 filed XXXX	
		P.C. mailed to the attys.	(26)
9/25/75		Memorandum of Law of Pltff's filed.	(27)
		CONTINUED Page "B"	(6)
SE SE			a la residia cidan

, De0

3-5-76	WOE	H.E.W.	750 (02)
	14H.	Poi della constanti di Constant	DOCKETNO
3-5-76		の表現である。 「「「「「「「「」」」、「「「」」、「「「」」、「「「」」、「「」」、「「」	PAGE DE PAGE
	Lttr ded 11 e	PROCEEDINGS	and the state of t
	Atty submite	-75 to Judge Neaher from Morte Ing further objective data to	The little and the second
	filed.	Ing further objective data to	Support -1 - Pinters
3-5-76	Lttr dtd 11-8.	75 to 1.1	Profixa claims
2 6 000	of similar act	75 to Judge Hesher from Morto ion, Yetth Youm et al v Lawre -75 to Pro Sa Clerk re propos	on Birnbaum = 642(97)
3-5-76			
3-5-76	permission to	-75 to Pro Se Clerk re propos use pseudonym, Frank Foe, fil.	ed ex parte order for
3 10	Letr drd 11-19	-75 to Judge Neebox Foe, £11.	ed. (49)
3-5-76	Conv Con B	-75 to Judge Neaher to oral at trabaum filed.	rgument of same date
	re plater	dtd 12-4-75 to Judge Neahor : hird claim for relief in their	(50)
	filed tile	hird claim for relief in their	r ameridad birnhaun
-5-76	Copy of letter	drd 12 0 7"	amenasa complaint
-5-76	re HEHRHRESHM C	dtd 12-9-75 to Judge Neaher f	Exom Morros Bins (51)
-3-70	Copy of lets di	natters material to the issues of 12-31-75 to Clerk of Court to You case to EDNYXUUXUUU for	filed.
	filed.	ta You case to EDMYVSGYVE	re transference (52)
-5-76	Meigorandum t	ta You case to EDNYXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX	on Atry Gen. a Office
0 00	Injunction ett.	Production to Platff's Applica	(33)
-5-76	Supplemental Mo	Baronda of	TON TOE Preliminary
-5-76	to Determine +1	and and the opposition	(54)
	Unsigned Order	Class filed.  Show Cause and Temporary Residavit of M. Birnbaum sworn to	FIDERON CON
5-76	Unad annexed aft	idavit of M. Bina Temporary Re	estraining Order (55)
	the ene	Edavit of M. Birabaum sworn to Show Cause and Temporary Re	0 11-14-74 filled, frank
5-76	heporondue aff1	davit of M. Birnbaum sworn to Show Cause and Temporary Redavit of M. Birnbaum sworn to	straining Order mon
	Reatraining out	an support of Platffa! Mand	- Laked. (57)1
5-76	Unsigned Order		one for a Temporary
	plnaffs and neal	ing the use of pseudonyms for	056161
5-76	Copy of litt dra	illed 2 c filed.	The Proposed
	A CAR	1 Com Lawrence Kolb	to David Marhama
12-76 18	COUNTRY PROPERTY CONTRACTOR	. 1 / 2	7 14 a 18
444/9	Notice of motion	ret. 5-21-76 re: to amend the	of Appenls.
1-76	The Mark of the Control of the Contr	The state of the s	
1	c. copy of judge	ment from C of A dismissing th	(62.)
		a dismissing th	he appeal filed. (62)

### BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

WALTER WOE (a pseudonym), by his mother and guardian, WILMA WOE (a pseudonym), on behalf of themselves and all others similarly situated,

Plaintiffs,

### - against -

Civil Action No. 75 C 1029 (ERN)

CASPAR W. WEINBERGER, individually and as Secretary of the United States Department of Health, Education and Welfare; THE UNITED STATES OF AMERICA; HUGH L. CAREY, individually and as Governor of the State of New York; LAWRENCE C. KOLB, M.D., individually and as Commissioner of Department of Mental Hygiene of the State of New York; MORTON WALLACH, M.D., individually and as Director of Brooklyn State Hospital; and, THE STATE OF NEW YORK,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENTS, FOR INJUNCTIONS, FOR HABEAS CORPUS AND FOR COMPENSATORY AND PUNITIVE DAMAGES; CLASS ACTION

PLEASE TAKE NOTICE that plaintiffs serve and file this Amended Complaint as of right pursuant to Rule 15 F.R.C.P.

### INDEX TO COMPLAINT

TITLE PAGE	Page
JURISDICTION	2
PLAINTIFFS	3
DEFENDANTS	8
FIRST CLAIM FOR RELIEF AGAINST ONLY THE STATE DEFENDANTS	9
SECOND CLAIM FOR RELIEF AGAINST ONLY THE STATE DEFENDANTS	15
THIRD CLAIM FOR RELIEF AGAINST ONLY THE FEDERAL DEFENDANTS	22
PRAYER FOR RELIEF	56

Plaintiffs, by their counsel, complain of the defendants as follows:

### JURISDICTION

I. Plaintiffs claims arise under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution; under Title XIX of the Social Security Act of 1935, as amended, 42 U.S.C. §§1396-1396g; under 42 U.S.C. §§ 1981, 1983 and 1985; and under Articles 13, 15, 31 and 35 of the New York Mental Hygiene Law.

The jurisdiction of this Court is based upon 28 U.S.C. §§ 1331, 1343 and 1361, and the aforesaid Amendments.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$10,000 for each named plaintiff.

Plaintiffs request declaratory judgments pursuant to 28 U.S.C. §§ 2201 and 2202; preliminary and permanent injunctions pursuant to 28 U.S.C. § 1651 and 42 U.S.C. § 1983 as they have no adequate remedy at law; a writ of habeas corpus; compensatory and punitive damages; attorneys' fees; and costs.

Plaintiffs seek injunctive relief restraining the enforcement of certain federal and New York statutes for repugnance to the Constitution of the United States; and, therefore, request the convening of a three judge District Court pursuant to 28 U.S.C. §§ 2281, 2282 and 2284.

Only some, but not all, of the plaintiffs' claims for relief require referral to, and decision by, the said three judge District Court.

### PLAINTIFFS

- II. The plaintiffs are:
- A. Walter Woe, a pseudonym, a 26 year old involuntarily civilly committed patient at Brooklyn State Hospital, a New York state mental hospital located in Brooklyn, New York.

He has been so involuntarily institutionalized since May, 1975. He has also been involuntarily civilly committed to this state mental hospital on more than 10 prior occasions since 1970; and,

- B. Wilma Woe, a psuedonym, his mother and guardian, by and through whom, he sues.
- III. Walter and Wilma Woe were allowed to prosecute this matter under a pseudonym, and their true names were sealed by order of the Honorable Edward R. Neaher, a judge of this Court on June 27, 1975.

Their true names have been made available by plaintiffs' counsel to defendants' counsel, and their true names are known to defendants' counsel.

IV. Walter Woe has standing to bring this lawsuit because he claims that he is repeatedly involuntarily institutionalized only in a state mental hospital because of a concatenation of factors, that he is very sick, that he is very poor and that he is black. Solely due to the fact that he is involuntarily institutionalized, de facto the judge or administrative official who commits him has him institutionalized only in a state mental hospital. This facility is overcrowded, understaffed and has inferior physical facilities. In this separate, unequal and inferior facility, Woe receives only a \$25.00 a day level of custodial and inadequate care. Accordingly,

he does not receive the adequate care and treatment that he is constitutionally required to receive due to the fact that he is involuntarily civilly committed.

Due to the fact that the judge or administrative official who commits Weefollows a <u>de factor</u> practice of sanist segregation, and orders Wee to be involuntarily institutionalized only in a state mental hospital, Wee has invidiously been denied the opportunity to be voluntarily admitted to a separate, unequal and superior general hospital with psychiatric facilities. As this general hospital is adequately staffed, is not overcrowded and has elaborate physical facilities, Wee would have received the \$250.00 a day level of active and adequate care that he needs and to which he is constitutionally entitled.

Living in Bedford-Stuyvesant, Woe further claims that he has access only to state mental hospital staff who refer him only for involuntary institutionalization at this separate, unequal and inferior state mental hospital facility. He says that if he were less sick, or less poor or white, he would have been voluntarily hospitalized by a private psychiatrist in a separate; unequal and superior non-state mental hospital facility in which he would have received the needed \$250.00 a day level of adequate and active care and treatment.

Medicaid, for which Woe is eligible, refuses to pay any part of the inadequate and custodial care costing only \$25.00 a day, but would pay without any question for all of the active and adequate care costing \$250.00 a day.

Woe claims that this invidious practice of <u>de facto</u>
sanist and racist segregation is unconstitutional. It
requires only, and is properly decided only, by a single
judge - not a three judge District Court.

V. Woe has further standing to bring this lawsuit because he claims that the New York Mental Hygiene Law under which he is involuntarily civilly committed only contains substantive provisions as to who should be involuntarily civilly committed and procedural provisions as to how this should be done.

He claims that as he is involuntarily institutionalized under loosely construed remedial mental health laws, these laws also should contain substantive and procedural provisions assuring him of the needed, and constitutionally required, adequate care and treatment.

Adequate staffing, adequate physical facilities and other aspects of adequate care are needed for Woe not only to assure that he will regain his health, and therefore his liberty as soon as possible. They are also needed to assure that the staff of the state facility will have the time and skill to properly determine whether or not Woe needs to be admitted by involuntary commitment and when he can be discharged. Overworked and inadequate staff cannot properly arrive at decisions as to whom, when and how to admit or discharge. These improper decisions violate Woe's Fourteenth Amendment rights whether made in the emergency room, the ward or in the courtroom.

Woe therefore claims that the New York involuntary civil commitment statutes are unconstitutional because they do not require, nor provide, adequate care. He claims that it is a matter of law, a matter of judicial notice, that he can, and does, receive only inadequate custodial care and treatment as his care costs only \$25.00 a day when adequate and active care in the same community costs a minimum of \$250.00 a day.

Vi. Woe has further standing to sue because prior to his involuntary institutionalization to a state mental hospital, he was a categorically needy financially indigent mentally disabled welfare recipient.

Accordingly, he was eligible for, and did receive, the full panoply of federal Social Security welfare benefits to which he was entitled, e.g. funds for food, clothing and shelter and Medicaid for health care needs.

Immediately upon being involuntarily institutionalized at Brooklyn State Hospital in May, 1975, and solely because he is a patient at a state mental hospital, all the federal Social Security Welfare and Medicaid benefits that Woe received prior to his institutionalization, and for which he is still technically eligible due to his financial indigency and severe mental disability, are not available to him. All these benefits are totally and arbitrarily denied to him. By contrast, if he had been admitted to general hospital facilities, these benefits would have continued. Accordingly, Woe claims that he does not receive the needed, and constitutionally required, adequate and active care at the state mental hospital primarily because of insufficient state funding that is indirectly caused by the denial of federal Medicaid funds. At the separate, unequal and inferior state mental hospital he receives only a \$25.00 a day level of custodial and inadequate care paid for only out of state funds.

At the separate, unequal and superior general hospital psychiatric facility, he would receive a \$250.00 a day level of adequate and active care - a major part of this cost would be paid for by federal Medicaid funds for which Woe is eligible.

Woe claims that his exclusion from Medicaid benefits solely because he is in a state mental hospital is arbitrary,

6

irrational and invidious and therefore unconstitutional. For the state mental hospital is totally excluded from becoming an approved Medicaid facility for the treatment of Woe even if it increases its expenditures; and provides active care and treatment as a cost that is less than the \$250.00 a day cost of care at the general hospital.

Furthermore, Woe specifically emphasizes that his standing to sue under his claim of Medicaid discrimination by the federal government is related only to the federal government, and is totally unrelated to his two claims against the State of New York. In his two claims against the State, he claims, first, that as an involuntarily civilly committed inmate of a state mental institution, he is constitutionally entitled to a level of active care comparable to the \$250.00 level of active care routinely provided in general hospitals. He was committed by the State of New York, and it only the State, and not the federal government, that is constitutionally obliged to provide active care. Second, he claims that the New York commitment laws must specifically require, and provide, the constitutionally mandated level of active and adequate care.

Woe claims that as he is constitutionally entitled to adequate care from the State because it was the State of New York that involuntarily institutionalized him, it is totally irrelevant to his claims for relief against the State whether or not the constitutional mandate that the State provide active care is or is not eased by any federal reimbursement through Medicaid.

VII. Wilma Woe has further standing to sue because she is also a categorically needy welfare recipient. Both named plaintiffs are residents of the State of New York. Both are black.

VIII. Plaintiffs sue in their own behalf and, pursuant to Rule 23 F.R.C.P. on behalf of other involuntarily civilly committed state mental hospital patients and their guardians who are so numerous that it is impractical to bring them all before the Court. The questions of law and fact are common to the entire class and the plaintiffs will fairly and adequately protect the interests of the class.

### DEFENDANTS

- IX. The defendants are:
- A. Caspar W. Weinberger is the Secretary of the United States Department of Health, Education and Welfare. In this capacity, he has been charged with the responsibility for the administration of the programs under the Social Security Act of 1935, as amended. This includes Title XIX (Medicaid) of this Act;
  - B. The United States of America;
- C. Hugh L. Carey is the Governor of the State of New York;
- D. Lawrence C. Kolb, M.D. is the Commissioner of the Department of Mental Hygiene of the State of New York. In this capacity, he has been charged with the responsibility for the administration of the New York laws governing the hospitalization of the mentally disabled for care and treatment. He also supervises the program of mental hospital catchment areas in New York State. Under this program, residents of definite geographical areas within the state who require mental hospitalization, are due to to federal and state statutory requirements usually hospitalized only at certain mental hospitals only within these areas.

Dr. Kolb's authority and responsibility is not limited to state mental facilities. It includes all mental facilities - governmental and non-governmental - in the State of New York.

- E. Morton B. Wallach, M.D. is the Director of Brooklyn State Hospital, and in that capacity has overall responsibility for the care and treatment of the plaintiff, Walter Woe; and,
  - F. The State of New York.

### POR A FIRST, AND SEPARATE, CLAIM FOR RELIEF AGAINST ONLY THE STATE DEFENDANTS

### X. SUMMARY OF CLAIM

As an involuntarily civilly committed inmate, Woe is constitutionally entitled to adequate and active care and treatment, either in a state mental hospital or in an alternative facility.

Quid pro quo, it is the State of New York that deprived Woe of his liberty, and it is the State of New York that constitutionally is mandated to provide this active care.

Prima facie, as a matter of law, as a matter of judicial notice, state mental hospital care that costs only \$25.00 a day is minimally adequate neither by common law standards of adequacy nor by constitutional standards of adequacy when compared with non-state mental hospital care in the same community - and even in adjacent buildings - that always costs more than \$250.00 a day, or more than 10 times as much.

It is irrational and invidious for a court to involuntarily civilly commit the sickest and the poorest mentally ill, de facto, only to state mental hospitals wherein they routinely receive only a grossly inadequate \$25.00 a day level of custodial care.

By contrast, the less sick and the less poor are voluntarily hospitalized by a private psychiatrist in the psychiatric facilities of general hospitals wherein they routinely receive the needed, and adequate level of care at a minimum cost of \$250.00 a day.

The situation is especially invidious as Woe is eligible for Medicaid. While Medicaid absolutely refuses to pay for Woe's \$25.00 a day level of custodial care in a state hospital — and properly so, Medicaid would fully and unquestionably pay for Woe's care in a general hospital with psychiatric facilities at a rate of \$250.00 a day, if the court had committed Woe to this general hospital instead of to a state mental hospital.

The situation is even more irrational and invidious as at the present time, most of the voluntarily hospitalized general hospital mental patients are Medicaid recipients.

Even though not financially indigent at the time of their admission by their private psychiatrist, the cost of psychiatric hospitalization is so high, and is routinely not covered by Blue Cross, etc., so that most of these patients are considered to be medically indigent. They have, therefore, become eligible for, and receive, Medicaid to pay for \$250.00 a day level of psychiatric care.

Furthermore, even if the state mental hospital routinely provided active care that is equal to the active care provided by the non-state hospital facility, it would still be unconstitutional to involuntarily hospitalize the involuntarily civilly committed only in the separate and equal state mental hospital while the general hospital admits only the voluntarily hospitalized.

The defendant, Lawrence C. Kolb, M.D., the Commissioner of Mental Health of the State of New York has the statutory power, and the constitutional duty, to end this sanist segregation of the involuntarily civilly committed. He must integrate the voluntarily hospitalized and the involuntarily hospitalized in both the state and non-state mental hospital facilities.

XI. Walter Woe is a 26 year old poor, black, uneducated, unemployed single resident of the Bedford-Stuyvesant area of Brooklyn, New York - one of the most impoverished socioeconomic "ghetto" areas of New York City. For non-emergency care, this catchment area is served primarily by two mental hospital facilities, Downstate Medical Center and Brooklyn State Hospital.

Since May, 1975, Woe has been an involuntarily civilly committed patient at Brooklyn State Hospital, a New York state mental hospital for the mentally ill. He has been so involuntarily institutionalized solely because the state claims that

for his own benefit, and the benefit of others, he needs care and treatment in a mental hospital. He is diagnosed as a schizophrenic personality complicated by sequelae of chronic alcoholism. He has never been accused of, much less convicted of, the commission of any crime.

All the patients at Brooklyn State Hospital. All the patients at Brooklyn State Hospital. All the patients at Brooklyn State Hospital. All the patients at Downstate are voluntarily hospitalized upon the referral of a physician. The majority of patients in this hospital receive Medicaid benefits, and all receive adequate and active care. The cost of this superior level of care is at least \$250.00 a day.

When has never been hospitalized, nor even been considered for hospitalization, for active treatment at this facility.

Brooklyn State Hospital is a New York state mental hospital located across the street from Downstate Medical Center. It is understaffed, overcrowded and has inferior physical facilities. As it is located in the center of a catchment area that is overwhelmingly black, it is not unexpected to find that both its patients and staff are disproportionately frequently black. The patients are more numerous, sicker, poorer, and less educated than the patients at Downstate. Most of them, as is Woe, are involuntarily hospitalized under court order or some other legal process. The active and adequate care needed by these patients is denied to them as the state only provides less than \$25.00. a day for all hospital, physician and other services provided to these patients. This is less than 1/10th of the cost of care routinely provided at Downstate.

said three judge District Court.

2

XIII. Since 1970, when he first required mental hospitalization, Woe has been involuntarily civilly committed for hospitalization on more than 10 occasions. Woe has never been hospitalized, nor even considered for hospitalization, for active treatment at Downstate. On each occasion, he has been involuntarily institutionalized only in the inferior facilities at Brooklyn State Hospital to receive inadequate custodial care.

On no occasion has he been hospitalized primarily upon the referral or recommendation of a private physician.

On each occasion, he has been involuntarily institutionalized through a court order or a temporary emergency legal proceedure without any prior hearing.

On every occasion, he has been institutionalized against his will by the efforts of the police and the non-professional staff of the state mental hospital. On no occasion, has he been institutionalized voluntarily.

On every occasion that he has been involuntarily civilly committed, he has escaped only to be recaptured through efforts of police and the non-professional staff of the state institution.

XIV. Prior to his present institutionalization, Woe was a categorically needy welfare recipient due to his financial indigency and mental disability. Being on welfare prior to his institutionalization, he received comprehensive federal Social Security benefits for food, clothing and shelter and comprehensive federal Social Security Medicaid benefits for health care.

Solely because hes is institutionalized in a state mental institution, all these federal welfare and health care Social Security benefits are terminated without any hearing arbitrarily and immediately upon entering this institution. It is not unexpected, therefore, to find that

and inferior facility, Woe receives only a \$25.00 a day level of custodial and inadequate care. Accordingly,

due to insufficient state funding - food, clothing, shelter and health care are all grossly inadequate - and are at a level below that provided outside the institution through a combination of state and federal benefits.

Furthermore, solely because he is involuntarily institutionalized, Woe is unable to leave the institution voluntarily and regain his prior federal welfare and health care benefits enjoyed prior to involuntary institutionalization.

XV. Woe further claims that he is involuntarily institutionalized under loosely construed remedial substantive and procedural mental health laws by a judge or other legal official only to the inferior \$25.00 a day facilities of a state mental hospital. He is involuntarily committed to this inferior institution because Downstate and other superior \$250.00 a day facilities are not available to the judge because the superior facilities do not accept involuntary patients.

At present, the judge that orders his involuntary institutionalization can, and does, commit him only to a state mental hospital where he is condemned to invariably receive inadequate custodial care.

XVI. Woe, living in Bedford-Stuyvesant, has no access to any private psychiatrist who could refer him to Downstate for voluntary hospitalization. He only has access to state hospital clinic or ward psychiatrists who have repeatedly referred him only to Brooklyn State Hospital for involuntary institutionalization.

Woe and his class claim, therefore, that their involuntary institutionalization only to state mental institutions where they are invariably condemned to receive only \$25.00 a day inferior custodial care, instead of the \$250.00 a day superior active care that they need, is unconstitutional.

requires only, and is properly decided only, by a single judge - not a three judge District Court.

avoil. Woe claims that at present there is a separate and unequal two-tier system of mental hospital care in this city that is invidiously and irrationally sanist and racist. Upper class patients who are disproportionately frequently white receive adequate and active \$250.00 a day care as voluntary patients in federally funded general hospitals with psychiatric facilities. Lower class patients like Woe, who are disproportionately frequently black, receive inadequate and custodial \$25.00 a day care as involuntary inmates in lower tier state mental hospitals excluded from federal funding.

Woe claims that because of a concatenation of factors, e.g. being severely mentally ill, being poor and being black, he is involuntarily institutionalized only in lower tier facilities. The primary determinants in determining which facility is available to him are his severe illness, his poverty; and his race. Because of these determinants, he is involuntarily civilly committed only to an inferior state mental hospital rather than being admitted voluntarily to a superior general hospital psychiatric facility.

Woe claims that as he is involuntarily civilly committed, he has a constitutional right to receive adequate care and treatment at the mental hospital to which he is committed. If the Medicaid exclusion of state mental hospitals is allowed to continue by this Court, if he is compelled to receive only inadequate \$25.00 a day care in Brooklyn State Hospital, then Woe claims that he has a constitutional priority over voluntary white patients to be admitted to, and receive care at, Downstate or some other superior upper tier \$250.00 a day federally funded general hospital.

XVIII. While Medicaid for which Woe is eligible will not pay for his custodial \$25.00 a day care at Brooklyn State Hospital, it will pay without any question for his \$250.00 a day active care at Downstate.

BEST COPY AVAILABLE

FOR A SECOND, AND SEPARATE, CLAIM FOR RELIEF AGAINST ONLY THE STATE DEFENDANTS XIX. SUMMARY OF CLAIM As an involuntarily civilly committed inmate, Woe is constitutionally entitled to adequate and active care and treatment, either in a state Mental hospital or in an alternative facility. Quid pro quo, it is the State of New York that deprived Woe of his liberty, and it is the State of New York that constitutionally is mandated to provide this active care. Prima facie, as a matter of law, as a matter of judicial notice; o, state mental hospital care that costs only \$25.00 a day is minimally adequate neither by common law standards of adequacy nor by constitutional standards of adequacy when compared with non-state mental hospital care in the same community - and even in adjacent buildings that always costs more than \$250.00 a day, or more than 10 times as much. Accordingly, Articles 13, 15, 31, and 35 of the New York Mental Hygiene Law are unconstitutional as applied to Woe and other involuntarily civilly committed inmates of state mental hospitals as these statutes neither provide nor require the constitutionally required minimally adequate active care and treatment. Therefore, all involuntary civil commitments to New York state mental hospitals are, and have been, unconstitutional. 15 In the 1970s, the inadequate custodial care received by all state mental hospital inmates remains.

received by air state mentar hospital inmates remains.

The sections of the New York Mental Hygiene Law that govern involuntary civil commitments to state mental hospitals of Woe and others similarly situated are in violation of the due-process-equal protection requirements of the Fourteenth Amendment to the United States Constitution. While many sections of the said Law regulate the substantive aspects of who should be involuntarily civilly committed, and the procedural aspects of how one should be involuntarily civilly committed, e.g. Sections 31.27, et seq., no section of this Law mandates that Woe, an involuntarily civilly committed state mental hospital patient, receive minimally adequate care and treatment for the allegedly severe mental illness that required his involuntary institutionalization. Accordingly, the state legislature is not required to, and does not, appropriate sufficient funds to provide adequate and active care in the state mental

hospitals.

As a result, Woe receives inadequate care and treatmenta at Brooklyn State Hospital, a separate and unequal and inferior state mental hospital. In this facility, Woe receives only custodial care at a \$25.00 cost.

The cost of the adequate and active care and treatment that he needs, and should morally and constitutionally receive - and for which he was ostensibly involuntarily institutionalized - at a superior non-state hospital such as Downstate

Medical Center is at least \$250.00 a day. As every general hospital with an in-patient psychiatric facility in New York City provides a level of care that costs at least 10 times as much as the cost of care in any New York state mental hospital, then as a matter of judicial notice, the level of care in the state facility may be adjudged inadequate. In no other area of medicine, e.g. internal medicine, surgery, pediatrics or obstetrics is there any significant difference in the cost of care between public and non-public facilities. The ending of the present Medicaid exclusions of Woe and his class would provide adequate funding for this problem, and would provide an administrative procedure under Medicaid regulations whereby adequate care would be assured to Woe and his class. For both the cost of care and the level of care in both state and non-state mental hospitals would be equal and adequate. XXI. Plaintiffs claim that there is a need for adequate care and treatment for involuntary civilly committed patients in state mental hospitals for both recognized and unrecognized legal reasons. They claim that there is a need for minimally adequate care and treatment to decide first, if a person should be involuntarily institutionalized, second, if he should continue to be so institutionalized and third, to aid him to regain his health, and therefore, his liberty as soon as possible... Plaintiffs claim that it is routinely overlooked by the law that if the state hospital is unable to provide proper care by means of an adequate staff and satisfactory physical facilities, the staff will not only be unable to properly decide and effectuate the conventional primary medical decisions of whom, where, when and how to treat a severely mentally ill person. The staff will also be unable to properly decide the primary legal substantive and procedural questions of whom, when and how to admit to, and discharge from, the state mental hospital.

In 1975, a decade later, there are still approximately

It is just as true when it is a formal judicial decision made in a court of law. For in reality, in most cases, a judge bases his legal decision upon the medical decision of a state mental hospital staff member.

### ARTICLE 13

XXIII. Article 13 of the said Mental Hygiene Law, and in particular, \$\$13.17, 13.19 and 13.21, which the defendants may claim provide a readily available method of assuring and obtaining adequate care and treatment are unconstitutional as applied to Woe, an involuntary inmate of a state mental institution.

The reasons are that he who is the complainant, he who is the plaintiff, he who is the judge and he who is the defendant, are all one and the same person, the Commissioner of Mental Hygiene. There is, therefore, no constitutionally required separation of functions when the hearing involves an involuntary inmate of a state mental hospital.

Furthermore, even if the procedures under Article 13
were to meet procedural constitutional requirements of due process,
the Article must still be held to be unconstitutional as there
is no provision in any section of the said Law for any method
to financially implement any decision made by the Commissioner
to raise the present inadequate level of care, i.e \$25.00 a day,

to the constitutionally required level of adequate care, i.e. a per diem expenditure of \$250.00 a day.

Article 13 is intended only for the regulation of the level of care in non-state mental facilities. In its entire history, it has never been used to improve care in the universally recognized inadequate facilities of the state mental hospital. Furthermore, the extensive hearings of a Court in this District that found grossly inadequate care at Willowbrook State School, and then ordered the most gross of these inadequacies corrected were completed without any claim by the state defendants that Article 13 was intended to, and could be used as, a method of correcting these undisputed gross inadequacies.

#### ARTICLE 15

XXV. Article 15, and in particular §15.03, of the said Law, is also unconstitutional as applied to Woe and similarly situated plaintiffs as its goal of assuring a satisfactory level of care and treatment is also merely precatory, and contains no method of enforcement in this section or in any other New York statute or regulation. Again, as in Article 13, there is no method provided for adequate funding of any attempt by the Commissioner to assure minimally adequate care and treatment to Woe and his class.

XXVI. Again, as in Article 13, at no time during the Willowbrook hearings did the state contend and prevail that Article 15 of the Mental Hygiene Law mandated a prior administrative hearing before a federal court could intervene and enforce the Federal Civil Rights Law.

XXVII. Again, as in Article 13, at no time has Article 15 been used by any person to improve the grossly inadequate care and treatment in New York state mental facilities to a minimally adequate level.

19

# SECTION 29.09 XXVIII. Under \$29.09 of the Law, the Mental Health Information Service is charged only with overseeing the substantive aspects of who should be institutionalized in state mental facilities, and the procedural aspects of how they should be so institutionalized. It has been given no authority, nor has it ever claimed to have been given authority, to assure adequate care and treatment in these facilities. XXIX. Since its establishment in 1965, and even during the extensive Willowbrook hearings, this agency has never involved itself with the widely recognized problem that inadequate care and treatment is routinely provided in New York state mental facilities. SECTIONS 31 AND 35 XXX. Articles 31 and 35 of the said Law set standards only as to the substantive aspects of who should be involuntarily institutionalized in a state mental hospital, and as to the procedural aspects of how one should be so involuntarily institutionalized. They contain no provision for, and no requirement of, minimally adequate care and treatment for these involuntarily incarcerated mentally ill to assure that the overworked inadequate professional staff has the proper time to assure that the decisions of who and how to admit, who and how to discharge and who and how to treat are all being made properly from a medical viewpoint. Woe claims, therefore, that as he has no readily available constitutionally required method to petition, and then obtain from, the Commissioner of Mental Hygiene of the State of New York, the constitutionally mandated adequate care and treatment that he needs; and that as a matter of judicial notice, the \$25.00 a day level of care that he receives in a state hospital is grossly inadequate as compared to the minimum of \$250.00 a

day level that is routinely received in every non-state mental hospital in New York City; that therefore, all the aforesaid sections of the New York Mental Hygiene Law that, <u>de facto</u>, mandate the involuntary civil commitment of Woe and his class only to grossly inadequate state mental hospitals are unconstitutional as applied to these inmates.

# FOR A THIRD, AND SEPARATE, CLAIM FOR RELIEF AGAINST ONLY THE FEDERAL DEFENDANTS

THE IRRATIONAL AND INVIDIOUS SANIST MEDICAID EXCLUSION OF WOE

AND HIS CLASS, IN GENERAL

XXXII. In 1965, Congress determined that a separate and unequal two-tier system of health care delivery existed in the United States. The middle and upper economic classes were usually financially able to obtain adequate health care in separate, unequal and superior facilities — either in the offices of private physicians or in the semi-private or private room of non-governmental hospitals. Most in the lowest economic class, however, were financially unable to obtain minimally adequate health care. If health care was available, it was available only in separate, unequal and inferior facilities — either in the free out-patient clinics or in the free in-patient wards of primarily local governmental hospitals.

XXXIII. Accordingly, Congress enacted Medicaid, Title XIX of the Social Security Act of 1935, as amended. It is a federal reimbursement plan to pay at least one-half of a state's expenditures on behalf of the medically indigent - those unable to pay for needed medical care. In most states, e.g. New York, it is not necessary to be financially indigent - to be on welfare - to be eligible for Medicaid. One need only be medically indigent.

In theory, therefore, Medicaid assured minimally adequate health care for all financially indigent Americans. For it covers all illnesses, both physical and mental, and covers these illnesses, whether major or minor, and whether acute or chronic. It also provides this care both inside and outside the hospital, nursing home, office and other medical facility.

Medicaid coverage extends from symptomatic minor therapy for colds and bunions to extensive therapy such as cancer surgery and kidney dialysis. It can also supplement other third-party coverage, e.g. Blue Shield, when this other coverage is inadequate.

XXXIV. Furthermore, Medicaid undertock to abolish not only separate and unequal health care delivery. It also prohibited the provision of separate and equal care. Medicaid mandated the admission of Medicaid patients to the semi-private rooms of all hospitals wherein these patients would be treated by private physicians. By paying fees equivalent to those prevalent in the community, Medicaid also provided care for Medicaid recipients in the offices of private physicians.

xxxv. In 1974, more than 20 million Americans were eligible for, and received, Medicaid benefits, and the federal government provided more than \$10 billion to the states under Medicaid's reimbursement provisions.

XXXVI. At first glance, therefore, all is rational in Medicaid - our nation's first plan for minimally adequate health care delivery to all Americans.

Except for almost all of the more than 700,000 Americans treated annually in our state mental hospitals who are arbitrarily, irrationally and invidiously excluded from Medicaid benefits.

THE ARBITRARY, IRRATIONAL AND INVIDIOUS MEDICAID EXCLUSION OF MOST STALE MENTAL HOSPITAL PATIENTS

XXXVII. In 1965, when Medicaid was first enacted it was well known, first, that a separate and unequal two-tier system of mental hospital care existed in the United States; and, second, that those who received the separate, unequal and inferior level of mental hospital care constituted the nation's number one unsolved problem in the delivery of adequate health care—and that this area had constituted a problem of this magnitude for more than 100 years.

## HISTORICAL BACKGROUND TO PROVE THE IRRATIONALITY OF THE EXCLUSION

XXXVIII. In 1958, Professors Augus S. Hollingshead and Fredrick C. Redlich, respectively Chairmen of the Departments of Sociology and Psychiatry at Yale University, published the results of a 10 year study of mental hospital care in the United States in their classic report entitled SOCIAL CLASS AND MENTAL ILLNESS. This study confirmed, in detail, what was already well-known - that a two-tier system of mental hospital care existed in our nation.

WXXIX. In the separate, unequal and inferior lower tier were the more numerous, the sicker, the poorer, the less educated, the disproportionately frequently black, and the disproportionately frequently involuntarily civilly committed among our nation's hospitalized mental patients - the patients in our state mental hospitals. These facilities were usually understaffed, overcrowded and had grossly inadequate physical facilities - all due primarily to inadequate state funding - and usually provided inadequate care.

In the separate, unequal and superior upper tier were the less numerous, the less sick, the wealthier, the better educated, the disproportionately frequently white, and the disproportionately frequently voluntarily hospitalized among our nation's hospitalized mental patients — the patients in our non-public mental hospital facilities. These facilities were invariably well staffed, not overcrowded, had excellent physical facilities — all due primarily to adequate private and community funding — and usually provided adequate care.

MENTAL ILLNESS, Congress had available to it the report of the Joint Commission on Mental Illness and Health which was published in 1961. This report entitled ACTION FOR MENTAL HEALTH was the result of a ten year Congressional funded study of our nation's number one unsolved problem in the delivery of adequate health care — the failure to provide adequate care for our severely mentally disabled. The director of this study

group was Dr. Jack R. Ewalt, now Chairman of the Department of Psychiatry at Harvard University. This report recommended the following:

11

#### THE COST

Expenditures for public mental patient services should be doubled in the next five years - and tripled in the next ten.

Only by this magnitude of expenditures can typical State hospitals be made in fact what they are now in name only - hospitals for mental patients.

Therefore, we recommend that the States and the Federal government work toward a time when a share of the cost of State and local mental patient services will be borne by the Federal government, over and above the present and future program of Federal grants in aid for research and training. The simple and sufficient reason for this recommendation is that under present tax structure only the Federal government has the financial resources needed to overcome the lag and to achieve a minimum standard of adequacy. . . .

Certain principles should be followed in a Federal program of matching grants to states for the care of the mentally ill:

The <u>first principle</u> is that the Federal government on the one side and State and local governments on the other should share in the costs of services to the mentally ill. (pp.xx-xxii) (Emphasis in original.)

- XLI. In 1965, in the face of these unanimous findings and recommendations by our nation's leading experts in the field of mental hospitalization, Congress included in Medicaid a total and arbitrary exclusion of state mental hospital patients under 65 years of age. This exclusion was recommended by no expert.
- XLII. Throughout the civilized world, many nations have enacted national health care plans to assure minimally adequate health care to their citizens. Only Medicaid excludes patients in state mental hospitals.
- XLIII. Throughout the entire civilized world, only Medicaid totally excludes state mental hospital patients from any benefit for any physical or mental illness while giving comprehensive benefits for the care of colds and bunions to minimally sick patients outside of state mental hospitals.

XLIV. In the 1970s, the inadequate custodial care received by all state mental hospital inmates remains, as it has for most of our nation's history, the number one unsolved problem in the delivery of adequate health care to all Americans.

In the face of this undisputed fact, Medicaid has assured not only the continuance, but the expansion, of the separate and unequal two-tier sanist system of mental hospital care in the United States. It has done this by totally and arbitrarily excluding from Medicaid all state mental hospital patients between the ages of 21 and 65 - or more than 85% of the more than 700,000 Americans treated annually in our state mental hospitals. 42 U.S.C. §1396.

XLV. The lower tier of our mental hospital system consists of the state mental hospitals whose patients are almost totally excluded from Medicaid. In this separate and unequal and inferior lower tier, one finds the more numerous, the sicker, the poorer, the less educated, the disproportionately frequently black and the disproportionately frequently involuntarily institutionalized. These facilities are invariably overcrowded, understaffed and have inadequate physical facilities that are often a fire and health hazard. In these institutions, the inmates routinely receive inadequate care and treatment (or what is technically called "custodial care.") The cost of this inadequate custodial care throughout the nation is usually about 1/10th the cost of needed adequate cost, e.g. in New York State, the average cost of state mental hospital care is \$25.00 a day for all hospital and physician's services.

Even if the state mental hospital were to increase its expenditures and services, and thereby provide adequate care and treatment (or what is technically called "active"

utilization of state mental hospitals is only slightly higher than white utilization.

care"). the state mental institution is still totally, arbitrarily and irrationally excluded from receiving any Medicaid benefit for its patients between 21 and 65.

time the state of the state of

The upper tier of our mental hospital system XLVI. consists primarily of general hospitals with in-patient psychiatric facilities whose patients have Medicaid benefits totally available to those who are eligible. In this upper tier, one finds the less numerous, the less sick, the less poor, the better educated, the disproportionately frequently white and the disproportionately frequently voluntarily hospitalized among our nation's hospitalized mentally ill. These facilities are invariably well-staffed, not crowded and have excellent physical facilities. In these hospitals, the patients invariably receive adequate and active care. The cost of this care is usually about 10 times the cost of custodial care, e.g. in New York State, the average cost of general hospital in-patient psychiatric care is more than \$250.00 a day for hospital and physician services.

XLVII. Accordingly, there is a separate and unequal sanist two-tier system of mental hospital care delivery in the United States. Medicaid instead of ameliorating this situation has only exacerbated this invidious chasm in health care.

In 1965, when Medicaid was first enacted, there were approximately 700,000 Americans from the lower socio-economic classes treated annually in separate, unequal and inferior lower tier facilities of the state mental hospitals. There were approximately 200,000 Americans from the upper socio-economic classes treated annually in the separate and unequal and superior upper tier facilities of the non-state mental hospitals.

27

PSYCHIATRIC PATTEMEN ADD HOHATTY WATER

In 1975, a decade later, there are still approximately 700,000 Americans from the lower socio-economic classes treated annually in the still separate, unequal and inferior lower tier facilities of the state mental hospitals. There are, however, approximately 700,000 Americans, primarily from the middle and upper socio-economic classes, treated annually in the increasing number of separate, unequal and superior upper tier facilities of non-state mental hospitals. Almost all of this latter care is paid for by third parties - the largest part of which is Medicaid.

XLVIII. Medicaid, therefore, has operated to provide more and better mental hospital care only for upper tier Americans. Furthermore, by increasingly depriving the state mental hospitals of desperately needed professionals who are increasingly leaving the state mental hospital system to work in the higher paying and less demanding positions in the upper tier facilities, Medicaid has actually acted to lower the standard of care provided in the lower tier facilities of the state hospital system.

It is not unexpected, therefore, that the delivery of an adequate level of care to the 700,000 Americans treated annually in state institutions remains the major unsolved problem in health care delivery in the United States.

XLIX. In 1965, if totally applicable to all hospitalized mentally ill Americans, Medicaid had the potential to be a federal "right to treatment" statute that would have assured the constitutionally required adequate care and treatment to all state mental hospital patients — and especially to the involuntarily civilly committed. Medicaid recognizes the right to adequate

28

I. STATE MENTAL HOSPITAL PATIENTS ARE USUALLY INVOLUN-TARILY CIVILLY COMMITTED WHILE GENERAL HOSPITAL

UNCOTTAIC AND DEVOUTAMENTEME TOD MIT CONTRACT care and treatment, it defines this right adequately by statute and regulation, it implements this right through adequate and substantial federal funding, and it enforces this right by taking away these funds if adequate and active care is not provided. Irrationally, however, Medicaid has granted this federal statutory "right to treatment" only to those upper tier Americans voluntarily hospitalized in separate, unequal and superior general hospital psychiatric facilities. It has invidiously denied this same statutory right to lower tier Americans involuntarily institutionalized in separate, unequal and inferior state mental hospitals - even if these state hospitals undertake to provide the needed and constitutionally required active care and treatment. Medicaid, therefore, has not done away with the separate and unequal two-tier sanist system of mental health care delivery that previously existed between Americans who were members of the upper and lower socioeconomic classes. It has, in fact, actually widened and exacerbated the chasm that existed prior to 1965, when Medicaid was first enacted, in the delivery of mental hospital care. From 1965 until today, Medicaid has developed into a federal reimbursement national health care plan that now provides more than \$10 billion annually for the care of 20 million medically indigent Americans. From 1965 until today, Medicaid has developed into a federal reimbursement national mental hospital care plan that now provides approximately \$1 billion annually - but almost totally for the care of the 29 THERE ARE DIFFERENT GATEKEEPERS FOR DIFFERENT MENTAL HOSPITALS - JUDGES FOR THE STATE MENTAL

05% of the 700.000 severely mentally 211 Americans treated

700,000 mentally ill Americans treated annually with active and adequate treatment in the separate, unequal and superior psychiatric facilities of general hospitals.

Irrationally and invidiously, it has totally and arbitrarily excluded more than 85% of the 700,000 lower socio-economic class Americans treated annually with custodial care in the separate, unequal and inferior facilities of the state mental hospitals.

LI. Plaintiffs in this case do not ask that the federal government grant the states reimbursement for the custodial care provided in the state mental hospitals to which the plaintiffs have been involuntarily institutionalized. Woe and his class, the involuntarily civilly committed in state mental hospitals, ask only that these state institutions — the only facilities available to them, de facto, because they are socially disadvantaged, severely mentally ill and involuntarily civilly committed — be declared eligible for federal reimbursement; but only if the patients in these state facilities receive active and adequate care, at a cost and with a time limit, not to exceed comparable care in a neighboring general hospital.

If in 1965, the federal government could establish a Medicaid plan that in 1975 now provides \$10 billion annually in federal reimbursement funds for the comprehensive care of colds and bunions as well as for cancer and heart disease; if the federal government in 1965 could establish a Medicaid plan that in 1975 now provides almost \$1 billion annually - but only for the active care being provided for 700,000 upper class Americans receiving active treatment in superior, separate and unequal general hospital psychiatric facilities; then the due process-equal protection requirements of the Fifth Amendment mandate that a similar amount, \$1 billion,

be made available to a similar number of 700,000 Americans now being routinely treated annually in our state mental hospitals - but only if this latter group receives active care in these facilities.

While admittedly more money alone may not cure him, the poor severely mentally ill American now involuntarily institutionalized only in state mental hospitals constitutionally deserves the same opportunity to see if more funds will help him or do nothing for him that is now routinely being given to less poor mentally ill Americans voluntarily hospitalized in our general hospitals.

L.

LII. FURTHER SPECIFIC PROOF OF THE INVIDIOUS SEPARATE AND UNEQUAL TWO TIER SANIST SYSTEM OF SEGREGATED MENTAL HOSPITAL CARE IN THE UNITED STATES

#### A. PER DIEM COSTS

TUUNITONAT.

In 1973, the average daily expenditure per patient in a state mental hospital was \$25.20. This included not only room and board, but also all physicians' services, all laboratory services, all medications, all social services, etc.

In New York, the average cost was only \$24.03, or below the national average. PRCVISIONAL PATIENT MOVEMENT AND ADMINISTRATIVE DATA - STATE AND COUNTY MENTAL HOSPITAL IN-PATIENT SERVICES, JULY 1, 1972-JUNE 30, 1973, STATISTICAL NOTE 106, DIVISION OF BIOMETRY, NATIONAL INSTITUTE OF MENTAL HEALTH (May, 1974), at 10.

By contrast, the average daily cost per patient for active care in the psychiatric service of a general hospital is at least 10 times the cost of custodial care in a state mental hospital.

For example, at Downstate Medical Center, the average daily cost per psychiatric in-patient during 1974 was \$307.01 - not including the cost of physician's and other professional staff services. Letter of July 17, 1975 to Morton Birnbaum, M.D. from the Office of Controller, Downstate Medical Center. The cost of services of a psychiatrist, psychologist, etc. usually runs upwards from a minimum of \$50.00 a day; therefore, the total cost per day for active care at this general hospital psychiatric in-patient facility is more than \$350.00 a day. Accordingly, the \$250.00 per diem figure used throughout this Complaint is actually a very low estimate of the average per diem cost in New York City of active care in a general hospital in-patient psychiatric service.

32

Throughout the nation, in no other area of hospital care, e.g. medicine, surgery, pediatrics and obstetrics, is there any significant difference in the same community between the cost of public hospital care and non-public hospital care.

Accordingly, the Court should take judicial notice of the fact that New York state mental hospital care is as a matter of law inadequate. State mental hospital care at a \$25.00 custodial level is as a matter of law grossly inadequate both by common law standards of adequacy and by constitutionally required standards of adequacy when compared with the needed \$250.00 level of active care received at the general hospital psychiatric facility.

This is especially true when as here, Brooklyn State Hospital and Downstate Medical Center are located in, and theoretically serve, the same community and treat the exact same illnesses - and are even physically adjacent.

The \$250.00 a day cost is paid for by Medicaid as follows: 50%, or \$125.00 by the federal government; and 25% each, or \$62.50 each, by the state and municipal governments. New York State, therefore, contributes \$62.50 per diem for the active care of a Downstate psychiatric patient, but pays only \$25.00 per diem when it provides total care - e.g. for Brooklyn State Hospital psychiatric care. It is not unexpected, therefore, for the state mental hospital patient to receive grossly constitutionally inadequate custodial care.

B. IN 1975, THE 700,000 LOWER STATE MENTAL HOSPITAL USUALLY FINANCIALLY INDIGENT STATE MENTAL HOSPITAL PATIENTS ASK ONLY FOR THE SAME FEDERAL MEDICATORELIMBURSEMENT FOR THEIR ACTIVE CARE THAT IS NOW ROUTINELY AVAILABLE FOR THE 700,000 MIDDLE AND UPPER SOCIO-ECONOMIC CLASS BUT USUALLY MEDICALLY INDIGENT PATIENTS IN GENERAL HOSPITAL PSYCHIATRIC FACILITIES

In 1965, when Medicaid was first enacted, there were approximately 700,000 Americans from the lower socio-economic class treated annually in separate, unequal and inferior segregated lower tier facilities of the state mental hospitals. These patients invariably received custodial care. In 1975, there are still the same number of patients from the same socio-economic class who are still receiving inadequate custodial care.

In 1965, when Medicaid was first enacted, there were less than 200,000 Americans from the middle and upper socio-economic classes treated annually in separate, unequal and superior segregated upper tier general hospital psychiatric facilities. These patients invariably received adequate care. In 1975, there are approximately 700,000 patients from the middle and upper socio-economic classes treated annually in these facilities and receiving active care. PSYCHIATRIC TREATMENT IN THE COMMUNITY, JOINT INFORMATION SERVICE OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE NATIONAL ASSOCIATION FOR MENTAL HEALTH (1974).

As most of the general hospital psychiatric patients do not have the personal rescurces to pay directly for their care, and as most of their Blue Shield or other third-party coverage is inadequate, it is usual for them to be declared medically indigent and have Medicaid pay for most of their hospital bill. In 1975, about \$1 billion went for the psychiatric in-patient care of medically indigent patients, but not one cent went for the care of any state mental hospital patient between the ages of 21 and 65. (Ibid.)

BEST COPY AVAILABLE

In New York City, approximately 85% of Medicaid recipients are financially indigent, i.e. welfare recipients, and only 15% are medically, but not financially, indigent; however, as persons often become medically indigent only when faced with high hospital bills not covered by insurance plans, these 15% who are medically indigent account for almost 50% of New York is Medicaid expenditures. (New York Times, January 22, 1973, at p. 35, col. 7.)

Medicaid, therefore, has operated only to provide more and better general hospital psychiatric care for middle and upper class Americans. In addition, it has actually harmed state mental hospital patients as their facilities are increasingly deprived of desperately needed professionals who are increasingly leaving the state mental hospital system to work in the higher paying and less demanding upper tier general hospital facilities.

The state mental hospital patients ask only that their facilities be eligible to receive Medicaid reimbursement if active care is provided. Plaintiffs contend that with active care not only will their mortality and morbidity decrease, but also that they will require less days of hospitalization - that they will require less days of involuntary institutionalization.

Plaintiffs concede that the federal government was not constitutionally obliged in 1965 to pay for in-patient psychiatric care; however, once it began to fund active care for the middle and upper class patients in their separate, unequal and superior facilities in general hospitals, the federal government is constitutionally obligated to fund active care for the lower socio-economic class patients in their separate, unequal and inferior segregated facilities in the state mental hospital system.

35

C. BOTH THE QUALITY AND THE QUANTITY OF PROFESSIONAL STAFFING OF STATE MENTAL HOSPITALS ARE GROSSLY INADEQUATE

The state mental hospitals have less than the equivalent of 11 full-time psychiatrists per 1,000 patients, or a ratio of 1 physician to 91 patients. It is not unexpected, therefore, that these patients receive only custodial care.

By contrast, the general hospital psychiatric facilities have the equivalent of 63 full-time psychiatrists per 1,000 patients, or a ratio of 1 physician to 15 patients. It is not unexpected, therefore, that these patients receive adequate and active care. PRIVATE MENTAL HOSPITALS 1969-1970, Mental Health Statistics Series A, No. 10, NATIONAL INSTITUTE OF MENTAL HEALTH (1972), at 11.

18

It is also not unexpected to find that as to the quality of staff, state hospital psychiatrists are almost invariably foreign-trained, and are usually licensed to work only in these state facilities. By contrast, general hospital psychiatrists are almost invariably American trained, and have unlimited state licensure.

For example, Brooklyn State Hospital had 93% foreign trained physicians when recently compared with Downstate that had only 16% foreign trained physicians.

Torrey, E.F. & Taylor, R.L., Cheap Labor from Poor Nations, 130 Am. J. Psychiatry 428 (1973). Dr. Torrey is a staff member of the National Institute of Mental Health.

D. THE SICKEST PATIENTS ARE IN THE STATE MENTAL HOSPITALS

It is usually accepted in psychiatry that schizophrenia is the most malignant and the most serious of the major psychoses. In 1972, in the 25-34 year old age group which includes Woe, 37% of the admissions to state mental hospitals were schizophrenics. By contrast, in the general hospital psychiatric services only 15% of admissions were diagnosed as schizophrenics.

See, AGE, SEX, AND COLOR VARIATIONS IN THE DIAGNOSTIC DISTRIBUTION OF ADMISSIONS TO INPATIENT SERVICES OF STATE AND COUNTY MENTAL HOSPITALS, UNITED STATES 1972, STATISTICAL NOTE 111, DIVISION OF BIOMETRY, NATIONAL INSTITUTE OF MENTAL HEALTH (December, 1974), at 1 for data on state institutions. See, PSYCHIATRIC TREATMENT IN THE COMMUNITY, op cit. supra, LII B, at 12, for data on non-state mental hospitals.

# E. THE POORER PATIENTS GO TO THE STATE MENTAL HOSPITALS

"(S)tate mental hospital . . . patients are known to be heavily concentrated at the lower socio-economic levels." ADMISSION RATES BY FAMILY INCOME LEVEL - OUTPATIENT PSYCHIATRIC SERVICES - 1969, STATISTICAL NOTE 47, BIOMETRY BRANCH, NATIONAL INSTITUTE OF MENTAL HEALTH (May, 1971) at 2.

# P. THE LESS EDUCATED PATIENTS GO TO THE STATE MENTAL HOSPITALS

"Admission rates show an inverse relationship between level of education and rate of admission; the lower the level of education, the higher the age-adjusted admission rate." ADMISSION RATES BY HIGHEST LEVEL OF EDUCATION ATTAINED - STATE AND COUNTY MENTAL HOSPITALS - 1972, STATISTICAL NOTE 104, BIOMETRY BRANCH, NATIONAL INSTITUTE OF MENTAL HEALTH (April, 1974), at 2.

G. HOSPITAL STAYS ARE NOT DISPROPORTIONATELY LONGER FOR STATE MENTAL HOSPITAL PATIENTS CONSIDERING THAT THEY ARE SICKER UPON ADMISSION.

The average period of hospitalization in state mental hospitals during 1971 was only 41 days. LENGTH OF STAY OF ADMISSIONS TO STATE AND COUNTY MENTAL HOSPITALS, UNITED STATES 1971, STATISTICAL NOTE 74 (February, 1973). Even this period would be shortened if these patients were to receive active care. Furthermore, they would be discharged far healthier than at present if the care that they received was better.

The average stay in general hospital psychiatric facilities that treat less sick patients is only slightly less. The average stay for a Downstate Hospital psychiatric patient is 31 days. Letter of July 17, 1975 to Morton Birnbaum, M.D., cit. supra, at LII A. Of course, after a course of active care, they are able to function far better upon discharge, and are less likely to have to return to the hospital.

H. BLACKS GO DISPROPORTIONATELY FREQUENTLY TO STATE MENTAL HOSPITALS AS A REFLECTION OF RACISM, THEIR POVERTY AND THEIR LACK OF EDUCATION.

There are far higher admission and resident patient rates of blacks in state mental hospitals than of whites in these institutions. There is no study, however, that claims that there is an increased incidence or prevalence of severe mental illnesses among blacks as compared to whites to account for these higher utilization rates by blacks of state facilities. These differences in utilization rates, therefore, are not a medical phenomenon. Rather thay are a socio-economic phenomenon due to the fact that for Wee and other similarly situated disadvantaged blacks who are severely mentally ill, there is no alternative to the state mental hospital for non-emergency hospital care.

Among the data that can be set forth in support of the above conclusions are the following: (1). THE UTILIZATION RATES OF PUBLIC OVER NON-PUBLIC MENTAL HOSPITAL FACILITIES ARE 3:1 AMONG WHITES; HOWEVER, ARE 14:1 AMONG BLACKS, A DIFFERENCE OF MORE THAN 450%. A recently published report by the National Institute of Mental Health entitled UTILIZATION OF MENTAL HEALTH FACILITIES 1971 discloses a difference among white males in the overall utilization rates of public versus non-public mental hospitals of 3:1. The comparable difference in utilization rates among black males are 14:1. This is a difference in racial utilization rates of more than 450%. These differences would be even greater if limited to the 26 year old group to which Woe belongs. (2). WHITE UTILIZATION OF PUBLIC MENTAL HOSPITALS IS APPROXIMATELY THAT OF BLACK UTILIZATION ONLY IN THE UNDER 21 AND OVER 65 AGE GROUPS. STATE MENTAL HOSPITAL PATIENTS IN THESE STATE AGE GROUPS RECEIVE MEDICAID BENEFITS. WHITE UTILIZATION OF PUBLIC MENTAL HOSPITALS IS FAR LESS THAN BLACK UTILIZATION BETWEEN 21 AND 65. STATE MENTAL HOSPITAL PATIENTS IN THESE LATTER AGE GROUPS ARE EXCLUDED FROM MEDICAID. ADMISSION RATES TO STATE AND COUNTY MENTAL HOSPITALS BY AGE, SEX AND COLOR, UNITED STATES, 1969, STATISTICAL NOTE 41, DIVISION OF BIOMETRY, NATIONAL INSTITUTE OF MENTAL HEALTH (February, 1971) gives further proof that the Congressional plan of excluding almost all state mental hospital patients invidiously discriminates against severely mentally 111 blacks. -In the over 65 age group that was included in Medicaid since 1967, and in the under 21 age group that has been included in Medicaid since 1972, black

utilization of state mental hospitals is only slightly higher than white utilization.

In the over 21 and under 65 age groups that have been excluded from Medicaid benefits to state mental hospital patients, black utilization of these facilities is several hundred percent greater than white utilization, varying with different ages.

These data are especially significant because the majority of state mental hospitalizations are involuntary civil commitments while, by contrast, non-public psychiatric hospitalizations are invariably voluntary; therefore, it is inevitable from these utilization data that a far higher percentage of blacks than whites are invariably involuntarily civilly committed due to racism.

The conclusion from these data is that in non-state mental hospitals wherein care is always more than adequate, and wherein the utilization rates by whites are disproportionately high, Medicaid is always available, and is frequently used. By contrast, in the state mental hospitals wherein care is usually grossly inadequate, and wherein the utilization rates by blacks are disproportionately high, Medicaid is not available. Prima facie, this is de facto governmental racism.

. The most authoritative review of these data by the nation's leading experts on mental health care epidemiology concludes:

Racist practices undoubtedly are key factors — perhaps the most important ones — in producing mental disorders among blacks and other underprivileged groups, in determining the place where members of these groups receive diagnosis and treatment for these disorders, and in determining the quality of such clinical services . . . . In some instances, the role of racism will be obvious; in others, not so obvious."

Kramer, M. Rosen, B.M., & Willis, E.M., Definitions and Distributions of Mental Disorders in A Racist Society, in WILLIE, C.V., KRAMER, B.M., & BROWN, B.S., RAJISM AND MENTAL HEALTH 353, 355-56 (1973).

The authors of this article are the Chief and and two members of the Biometry Branch of the National Institute of Mental Health.

Because of these data, and because of their unique expertise, the Executive Committee of the Black Psychiatrists of America, a national organization of over 300 black psychiatrists, comprising more than 90% of all black psychiatrists in the United States, in December, 1973, issued the following condemnation of the racist Medicaid exclusion of state mental hospital patients:

" (I)t demonstrates an unconscionable denial to the mentally ill black and indigent persons who are served by the Black Psychiatrists of America of the means by which they may be cured, and may be returned to their communities as useful, productive citizens.

Whether intentionally or otherwise, the present Medicaid laws as drafted exclude great numbers of black and other indigent patients from their coverage. By virtue of their economic status, the disadvantaged blacks of this nation are compelled to use the state hospital systems for mental treatment. The exclusion of Medicaid support for indigent blacks and others in the state mental hospital systems of our nation is an unconscionable and discriminatory practice against this most significant segment of our American citizenry, and is by definition an unconstitutional method of funding health care services."

I. STATE MENTAL HOSPITAL PATIENTS ARE USUALLY INVOLUN-TARILY CIVILLY COMMITTED WHILE GENERAL HOSPITAL PSYCHIATRIC PATIENTS ARE USUALLY VOLUNTARILY HOSPITALIZED

Throughout the nation, most state mental hospital patients are involuntarily civily committed to these institutions, e.g. in 1972, only 48.6% of state mental hospital admissions were voluntary. LEGAL STATUS OF INPATIENT ADMISSIONS TO STATE AND COUNTY MENTAL HOSPITALS, UNITED STATES 1972, STATISTICAL NOTE 105, DIVISION OF BIOMETRY, NATIONAL INSTITUTE OF MENTAL HEALTH, (May, 1974), at 2.

By contrast, the overwhelming majority of general hospital psychiatric admissions are voluntary hospitalizations. as can be seen by the following data from the Annual Report of the Mental Health Information Service for the fiscal year 1973-4. These data are only available for the First Department.

# LEGAL STATUS OF ADMISSIONS TO IN-PATIENT PSYCHIATRIC FACILITIES

Name of General Hospital	<u>Voluntar</u> y	Involuntary
Mount Sinai Hospital	881	0
New York Hospital	733	0
University Hospital	307	0
Roosevelt Hospital	573	0
Name of State Mental Hospit	al	
Manhattan State Hospital	1,112	2,206

Manhattan State Hospital is the state mental hospital that serves the same catchment areas served by the above general hospitals.

J. THERE ARE DIFFERENT GATEKEEPERS FOR DIFFERENT MENTAL HOSPITALS - JUDGES FOR THE STATE MENTAL HOSPITALS AND PSYCHIATRISTS FOR THE GENERAL HOSPITAL PSYCHIATRIC FACILITIES.

The gatekeepers to the general hospitals are usually psychiatrists in private practice on the staffs of these hospitals, and these physicians control admissions to these hospitals. They usually are able to persuade their middle and upper class patients to accept voluntary hospitalization in the separate, unequal and superior upper tier facilities of a general hospital as an alternative to being involuntarily institutionalized in the separate, unequal and inferior lower tier facilities of a state mental hospital.

"In many cities, but particularly in the larger ones, and particularly in the voluntary hospitals, the service pattern is one in which the privately practicing psychiatrist admits the patient to the general hospital inpatient service, which in many, perhaps most, cases will have no staff psychiatrists. The private practitioner attends the patient while he is in the hospital, and upon his discharge continues to see him as needed in his private office." PSYCHIATRIC TREATMENT IN THE COMMUNITY, op. cit., supra, at

By contrast, the gatekeeper to the state mental is usually a judge, an administrative legal official or a state mental hospital staff physician who is usually unable to persuade the lower class patient to accept voluntary hospitalization to receive inadequate custodial care in the separate, unequal and inferior segregated lower tier facility, the state mental hospital.

K. IN MANY WAYS, PATIENTS IN STATE MENTAL HOSPITALS ARE TREATED LIKE PRISONERS.

For all practical purposes, therefore, the only groups of medically indigent Americans totally excluded from federal health care benefits are: (1) 200,000 common criminals who after conviction are imprisoned annually in our state penal institutions - but only a few of whom

require intensive medical care; and, (2) approximately 85% of the 700,000 severely mentally ill Americans treated annually in our state mental hospitals - all of whom require intensive psychiatric care, and many of whom also require extensive surgical and medical care. Lansbury, J., The Prevalence of Physical Disease in A Large Mental Hospital and Its Implications for Staffing, 23 HOSPITAL AND COMMUNITY PSYCHIATRY 148 (1972)

For both prisoners in state penal institutions, and for patients in state mental hospitals, their pre-existing eligibility for Social Security benefits is arbitrarily and automatically terminated for both federal welfare benefits for fcod, clothing and shelter and for federal Medicaid health care benefits for both mental and physical illnesses.

and the inmates of state penal institutions, this arbitrary and automatic termination of Social Security benefits occurs immediately appn being institutionalized. Both groups receive no substitute federal benefits, and no equivalent state benefits. Also like common prisoners, the involuntarily civilly committed patients are unable to voluntarily leave their institutions at will to return to the community and regain their federal Medicaid health care benefits and other welfare benefits.

While the state penal institution inmate is institutionalized only after the judge complies with strictly construed substantive and procedural penal statutes, the patient is involuntarily institutionalized far more readily - by the judge or other legal official complying with loosely construed substantive and procedural remedial statutes. The gatekeeper to the state penal institution and to the state mental hospital is the judge, or some other legal official.

L. SANISM OPPRESSES THE INVOLUNTARILY CIVILLY COMMITTED STATE MENTAL HOSPITAL PATIENT MORE THAN ANY OTHER MENTALLY ILL PERSON; THEREFORE, THE INVOLUNTARILY CIVILLY COMMITTED IN OUR STATE MENTAL HOSPITALS CONSTITUTE A "SUSPECT CLASSIFICATION" AND STRICT SCRUTINY IS REQUIRED OF ANY CONGRESSIONAL DISCRIMINATION AGAINST THEM.

All of the foregoing are examples of sanism, of how sanism exists in our society and of how it particularly oppresses the involuntarily civilly committed in our state mental hospitals.

Analogous to the claims of blacks that they are oppressed by the bigotry of our racist society, and analogous to the claims of women that they are oppressed by the bigotry of our sexist society, so can the severely mentally ill, and particularly the involuntarily civilly committed in our state mental hospitals claim that they are being invidiously and irrationally oppressed by the bigoted thinking, feeling and behavior patterns of our sanist society.

Sanism is the irrational thinking, feeling and behavior patterns of response by an individual or by a society to the irrational - and sometimes even to the rational - behavior of a mentally ill individual. It is morally reprehensible because it is an unnecessary and disabling oppressive burden that is added by our bigoted and prejudiced society to the very real affliction of mental illness.

No group in our nation is more irrationally and invidiously oppressed by our society than the involuntarily civilly committed state mental hospital patients. No group is more deserving to be considered a "suspect classification" by the courts when weighing the constitutional validity of a legislative discrimination against this oppressed group.

LIII, Every expert opinion by every major national health care group, every expert opinion by every major national black health care group, and every opinion by every major black national civil rights group and every other expert opinion - including that of the United States Department of Health, Education and Welfare - states that the present Medicaid exclusion of involuntary civilly committed patients in state mental hospitals who are between 21 and 65 is both medically and sociologically irrational. Furthermore, that this Medicaid exclusion invidiously discriminates against blacks and other socially disadvantaged severely mentally ill Americans.

No expert opinion says that the Medicaid exclusion plan is rational.

The Court, therefore, should not adopt an Emperor's Clothes approach. It should hold that the Medicaid exclusion of these state mental hospital patients is irrational and invidious, and therefore, unconstitutional.

#### THE EXPERT OPINIONS OF EVERY MAJOR NATIONAL HEALTH CARE GROUP

#### A. AMERICAN MEDICAL ASSOCIATION

\*

Physicians specializing in the treatment of mentally ill patients have been particularly concerned with the limitations placed on the amounts of benefits available for psychiatric treatment and services under Title . . . XIX of the Social Security Act of 1935 as amended. Of particular concern has been the provision under Title XIX for the care and treatment of mentally ill patients otherwise eligible for benefits which differentiates on the basis of age and the institution in which treatment is being received. The inequities produced by the current Medicaid provisions deprive indigent patients not only of valuable civil rights but also, in many cases, prevent such patients from receiving a level of care commensurate with proper standards of psychiatric and medical treatment."

46

#### E. AMERICAN NURSING ASSOCIATION

The Association believes that the (exclusion) will result in a denial to the mentally ill, . . . and indigent persons of the means by which their symptoms may be alleviated to the extent that they may be returned to the communities as useful and productive citizens."

### C. AMERICAN ORTHOPSYCHIATRIC ASSOCIATION

" (Patients) are those groups who have throughout history, been among the most powerless in society. . .

(M)ost disturbing of all is the fact that the cut-off of funds at the point of complete deprivation of liberty involved in involuntary hospitalization prevents the (patients) from receiving . . . treatment . . . And it is certain that only through the receipt of treatment will (patients) be in a position to return to the community."

## D. AMERICAN PSYCHIATRIC ASSOCIATION

The American Psychiatric Association, one of the groups most qualified by its expertise, to evaluate the socio-psychiatric validity of this discrimination in the delivery of mental hospital care has unequivocally condemned this invidious discrimination, at length, as follows:

"EQUAL PROTECTION IS DENIED BECAUSE THE . . . CLASSIFICATION DOES NOT EVEN BEAR A RATIONAL RELATION TO THE LEGISLATIVE PURPOSE.

(T)he challenged classification in the Medicaid legislation is not an imprecise guess in the right direction, but is based on a wholly wrong criterion. . . . it neglects the field most obviously and rightly in need of a remedy, and . . . it operates to widen rather than to lessen or leave the same the existing inequities in the quality of medical care.

(T)he argument against 'mathematical nicety' has no relevance here. This is not a case in which a classification could have been

a bit more precisely drawn so as to take account of a few random individuals on either side of the line who happened to be similarly situated. In Medicaid, the vast majority of potential, technically eligible mentally ill recipients are, in practice, totally excluded from benefits while a small, arbitrarily selected minority are granted comprehensive benefits. Far from imprecision, this is clear discrimination.

(T)he government has sought to defend a classification scheme which totally excludes the majority of eligibles and increases inequity of resources. Burthermore, the basic point is simply this: the criterion of residency in a state or county mental hospital versus a private or general hospital as used to confer or withhold Medicaid benefits, is not rationally related to the expressed Congressional purpose of providing upgraded medical care to all - but particularly to the 'needy' who had hitherto been able to afford only the meagerest care. There need be no mystical search for the holy grail of Congressional purpose here: the structure and history of Medicaid bespeak its intent. Full coverage, equalization and uniformity are its overall goals.

The patients in state and county mental hospitals are more likely than other patients to be poor, more likely to be black. They are more likely to be afflicted with the more onerous mental disorders . . . . The institutions themselves start out less well-equipped and staffed than private institutions. And yet within the omnibus scope of Medicaid, the exclusion of state hospital patients is the only real exception to the pattern of maximally serving the 'needy.' Because of its history and effects, therefore, this exception must be viewed as a mistaken excresence, and as one which employs a constitutionally repugnant criterion wholly unrelated to the clear statutory purposes.

#### E. AMERICAN PUBLIC HEALTH ASSOCIATION

" Nothing in the legislative history of Medicaid justifies excluding those under 65, from the same coverage as those over 65.

This is particularly relevant, and raises the matter to serious constitutional dimension, when . . . almost all community mental health centers with inpatient psychiatric facilities and private psychiatric hospitals have affiliated themselves with general hospitals and thus are not covered by the exclusion. . . . In effect, all persons over 65 and all persons albeit under 65 but with access to

private psychiatrists and private institutions. may be eligible for Medicaid coverage, while all persons under 65 who are forced by a combination of social factors into public mental institutions are denied Medicaid coverage. There is nothing rational in this distinction: first, while (a Court) may refer to the Congressional belief that the care of the mentally ill in state hospitals was the responsibility of the states, the arbitrary age of 65 is used to cancel that 'belief;' second, while (a Court) may refer to the Congressional objective that . . . Medicaid was designed to alleviate the cost of health care which is active and remedial rather than custodial, in fact those persons in public mental hospitals over 65 are custodial patients while the younger patients are the ones who would be eligible for active and remedial treatment if money (such as available under Medicaid) was available to pay for their treatment.

## F. NATIONAL ASSOCIATION OF STATE MENTAL HEALTH DIRECTORS

This Association represents the directors of the programs for the mentally ill in the 54 states and territories.

" We propose an amendment to Title XIX of the Social Security Act as follows:

In PL 98-97 - at the end of Section 1905 (a) (1) after 'in-patient hospital services' strike out the phrase '(other than services in an institution for . . . mental diseases).'

This amendment would not change the eligibility provisions of Title 19 coverage.

It would not expand any benefits now available under Title 19 (mental illness is now treatable with Federal assistance.)

It would simply broaden the availability of treatment for those already eligible by removing the exclusion against the hospitals that specialize in the treatment of mental illness. . .

#### THE PRESENT LAW

Under Title 19, . . . . persons under 65 years of age in . . . three assistance groups (the blind, the disabled and the dependent children families) are excluded from in-patient treatment in a specialty hospital.

They can receive <u>in-patient</u> treatment only in a general hospital.

# SHCRTCOMINGS IN LAW If the Con

If the Congress is going to offer support of treatment for mental illness, then it appears totally inconsistent to exclude . . . sources . . . that offer more available treatment . . . than the one authorized source (the general hospital) . . .

The 'specialty' hospitals . . . are designed, staffed and equipped to provide a continutiy of care for people with all ranges and severity of mental illness . . .

We treat the acutely ill and the chronically ill; the psychotic, the neurotic, adults and children; the alcoholic, the aged, the disabled.

We are 'specialty' hospitals whose treatment prog. `ms are completely focused on alleviating disorders of the mind.

It makes no sense at all, wo us, for Congress to prohibit the treatment of persons with mental disorders in facilities whose sole purpose is the treatment of mental disorders.

This is an inconsistency difficult for us to fathom."

THE EXPERT OPINIONS OF EVERY MAJOR NATIONAL BLACK HEALTH CARE GROUP

## G. ASSOCIATION OF BLACK PSYCHOLOGISTS

We feel that this dual system of health care, in fact, constitutes de facto discrimination that perpetuates inferior and inadequate health care to blacks, other ethnic minorities, and low income people generally.

This present policy serves as a negative incentive; it discourages prospective patients from seeking necessary mental health care that would enhance the possibility of effective rehabilitation because they fear losing their health coverage. This penalty would undermine any progressive and affirmative approaches toward mental health."

#### H. BLACK PSYCHIATRISTS OF AMERICA

Whether intentionally or otherwise, the present Medicaid laws as drafted exclude great numbers of Black and other indigent patients from their coverage. By virtue of their economic status, the disadvantaged Blacks of this nation are compelled to use state hospital systems for mental treatment. The exclusion of Medicaid support for indigent Blacks and others in the state mental hospital systems of our nation is an unconscionable and discriminatory practice against this most significant segment of our American citizenry and is by definition an unconstitutional method of funding health care services."

#### I. NATIONAL MEDICAL ASSOCIATION

"The Medicaid . . . laws, as presently written, exclude from coverage the vast majority of patients in the nation's state mental hospitals. They include, however, all patients in the psychiatric wards of general nospitals. Since Blacks are going in disproportionate numbers to the state hospital system . . . where federal monies are unavailable, and are excluded in large measure from the psyhciatric wards of the general hospital, then a situation of de facto discrimination against the Black mentally ill would seem to be clearly shown."

THE EXPERT OPINIONS OF EVERY MAJOR BLACK NATIONAL CIVIL RIGHTS GROUP

#### J. CONGRESS OF RACIAL EQUALITY

"De facto discrimination against the Black citizen . . . denies him access to federally-funded voluntary hospitals and forces his incarceration in non-federally funded state institutions . . .

It is the excluded hospital system that is the only route open to the mentally disabled Black, the only place he is allowed to look for care and treatment that might return him to society as a productive and fully-functioning citizen. But without the federal funding now offered to the general hospital, the black man will look for help in vain."

NATIONAL ASSOCIATION FOR THE ADVANCE-MENT OF COLORED PEOPLE K. " This . . . raises a serious and substantial issue ultimately relating to the racially discriminatory aspects of the mental health benefits program encompassed within the federal medicaid legislation. The statute under attack herein is extremely complex; and what seems to help the poor Black and Hispanic persons on its face, does not do so because of external factors not apparent from an analysis of the statute itself. (W)hether by design or merely the happenstance of effect, disproportionate members of minority group persons suffering from a psychological malady are arbitrarily shunted off to state custodial institutions and, accordingly, denied medicaid benefits, while their white counterparts are treated in short-term institutions and accorded the financial benefits of edicaid." NATIONAL BLACK FEMINIST ORGANIZATION L. (P)oor Black women and men involuntarily committed to state mental hospitals in numbers that are all out of proportion to their representation in the general population, deserve better treatment in those state hospital than they now receive. If, indeed, it is the purpose of these hospitals to cure patients, and not just provide custodial care, then the best medical care, with adequate and highly-trained staffs, are vital to this purpose. We believe that until the present inequities produced by the current Medicaid provisions are challenged by interested groups such as ours, and corrected by the Courts, these intolerable conditions that now exist in our state hospitals will not change. NATIONAL CONFERENCE OF BLACK LAWYERS M. Discrimination against blacks by hospitals is another chapter in the history of oppression of blacks in this country. Although courts have ordered some private hospitals to admit blacks, racial discrimination in the dispensation of health services continues."

# N. NATIONAL URBAN LEAGUE The National Urban League has addressed itself to the many problems of blacks and other disadvantaged minorities . . . in the area of proper and adequate delivery of health services. . In the case of a statute which appears to be nondiscriminatory on its face, but which operates in a discriminatory manner, it is fitting for the persons discriminated against to seek a remedy. In this case the aggrieved are not only black, but they are mentally incapacitated as well. The constitutional protection afforded by the Bill of Rights is essentially antimajoritarian in that weak and disadvantaged citizens need protection more than the comfortable members of the status quo. The helpless plight of (these patients) is virtually a matter of judicial notice. . . THE UNDISPUTED EXPERT OPINIONS OF THE FEDERAL AND STATE GOVERNMENT EXPERTS 0. THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION & WELFARE - THE FEDERAL EXPERTS The Medicaid program by statute excludes persons under age 65 from in-patient hospital and nursing home services in institutions for mental illness, even when such persons are among the categorically needy and medically indigent. An estimated 253,000 persons were in this latter category in 1967. There is no similar age restriction for other medical care services under Medicaid. (46) (P)sychiatric experts consulted by DHEW staff stressed two factors: (1) The age restriction in Title XIX excluded people in age groups most likely to benefit from active treatment in the psychiatric hospital. (2) Such treatment made available under Medicaid would contribute to the rehabilitation of young and middle-aged adults and facilitate their return to the community as economically productive and useful members of

society." (40) FINANCING MENTAL HEALTH CARE UNDER MEDICARE AND MEDICAID, Research Report No. 37, Office of Research and Statistics, Social Security Administration, U.S. Department of Health, Education and Welfare (June, 1971)

P. THE STATE EXPERTS - NATIONAL ASSOCIATION OF STATE MENTAL HEALTH DIRECTORS While the Attorney General of the State of New York, counsel for the state defendants may oppose plaintiffs' claims of the irrationality of the Medicaid exclusion, the Commissioners of Mental Health of all the states and territories, including New York, have always supported the ending of this exclusion, see F, supra. THE EXPERTS WHOM THE STATE AND FEDERAL DEFENDANTS CAN CITE IN SUPPORT OF THEIR POSITION AND AGAINST THE CLAIMS OF MEDICAL AND SOCIOLOGICAL IRRATIONALITY IN THE PRESENT MEDICAID EXCLUSION OF STATE MENTAL HOSPITAL PATIENTS DO NOT EXIST LIV. The state and federal defendants will not be able to cite even one expert to cite that the exclusion is rational. Counsel will come into Court, and give the opinion of the counsel who will prepare the briefs and argue orally to the Court. At no point, will counsel come into court with affidavits from their clients who are experts in the field, e.g. Dr. Lawrence Kolb, to say that the Medicaid exclusion is a rational and not invidious approach to the area. Only in the Emperors' Clothes area of the state mental hospital system are lawyers allowed to pose an experts as to what is adequate and active care for the severely mentally ill; and, it is only in the Emperors' Clothes area of the state mental hospital system that Courts accept the statements of counsel for defendants as to what is rational in the specialized area of mental hospital care.

LV. As a result of the series of attacks leveled against the unjust Medicaid exclusion by health care and black civil rights groups, there appears to be an increasing Congressional awareness of the injustice encompassed in Medicaid. Prior to 1973, when this series of attacks began, no proposed national health care plan included all state mental hospital patients as potential beneficiaries even if they received active care. Since 1973, every proposed national health care plan includes these patients as beneficiaries but only if they are receiving adequate and active care.

With the present recession-depression, however, there is probably little likelihood of any of these proposals now being enacted. In the forseeable future, therefore, the state mental hospital because of insufficient state funding, and without any supplemental federal funding, will continue to provide only custodial and constitutionally inadequate care.

Accordingly, unless this Courts decides in favor of the plaintiffs, it is certain that the invidious separate and unequal two tier sanist system of segregated mental hospital care will continue in the United States.

PRAYERS FOR RELIEF WHEREFORE, plaintiffs pray: I. That a declaratory judgment be entered that the de facto sanist practice of segregating involuntarily civilly committed persons in separate, unequal and inferior state mental hospitals wherein they receive only a \$35.00 day level of inadequate custodial care is unconstitutional; II. That a declaratory judgment be entered that the involuntarily civilly committed must constitutionally be integrated with the voluntarily hospitalized in the separate, unequal and superior general hospital psychiatric facilities wherein the said involuntarily institutionalized can receive a \$250.00 day level of adequate and active care that they need, and which is constitutionally required; That a declaratory judgment be entered that Articles 13, 15, 31 and 35 of the New York Mental Hygiene Law are unconstitutional on their face, or as applied to the Involuntarily civilly committed in state mental hospitals in that these

entered that Articles 13, 15, 31 and 35 of the New
York Mental Hygiene Law are unconstitutional on their
face, or as applied to the Involuntarily civilly
committed in state mental hospitals in that these
statutes only contain substantive provisions as to
who should be involuntarily hospitalized, and
procedural provisions as to how these persons should
be involuntarily institutionalized. They do not
contain any provision to assure that the involuntarily
institutionalized in state mental hospitals will
receive the \$250.00 a day level of adequate and active
care which they need, constitutionally require, and in
fact, do not receive.

56

That a declaratory judgment be entered 3 declaring unconstitutional the provisions of 42 U.S.C. §1396-13966 that exclude from Medicaid benefits all patients in state mental hospitals who are over 21 and under 65 years of age; V. That a declaratory judgment be entered declaring that the state mental hospital should be given the same opportunity that is given to any other medical, surgical and psychiatric facility to obtain Social Security Administration Medicaid certification as a facility that is able to, and does, provide active and adequate treatment. If the state mental hospital then proves to the Social Security Administration inspection teams that it is providing such active and adequate care to its patients who are between 21 and 65 years of age, then this hospital should receive federal Medicaid benefits for the care of these patients who are eligible for Medicaid; VI. That other judgments be entered as needed, and that preliminary and permanent injunctions be entered enforcing these declaratory and other judgments; and, VII. For compensatory and punitive damages in the sum of \$20,000.00 for each named plaintiff, for reasonable attorneys' fees, for costs and for such other and further relief as to this Court may be just and proper. Dated: Brooklyn, New York August 4, 1975 Respectfully submitted, 225 Tompkins Avenue Brooklyn, New York 11216

Paul J. Clifford 120 Broadway New York, New York 10005 and both as Counsel for the Center for Law and Health Care Policy, Inc. (A Public Law Firm) 225 Tompkins Avenue Brooklyn, New York 11216 Attorneys for Plaintiffs 58

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

WALTER WOE, et al.,

Plaintiffs,

- against -

CASPAR W. WEINBERGER, et al.

Defendants.

AMENDED COMPLAINT

MORTON BIRNBAUM COUNSELOR AT LAW 225 TOMPKINS AVENUE BROOKLYN, N. Y. 11216 Cite as 403 F.Supp. 419 (1976)

Accordingly, treating defendant's motion to dismiss as a motion for summary judgment, it is allowed.



Walter WOE (a pseudonym), by his mother and guardian, Wilma Woe (a pseudonym), on behalf of themselves and all others similarly situated, Plaintiffs,

v.

David MATHEWS, Individually and as Secretary of the United States Department of Health, Education and Welfare, et al., Defendants.

No. 75 C 1029.

United States District Court, E. D. New York.

Jan. 16, 1976.

Action was brought against state officials charging that the confinement of involuntarily civilly committed persons in state mental hospital affording only custodial care and not treatment violated due process and equal protection, and that certain provisions of the New York Mental Hygiene Law were unconstitutional and against federal officials challenging constitutionality of federal statute excluding state mental hospital patients between ages of 21 and 65 from receiving medicaid benefits. On defendants' motions to dismiss and on plaintiffs' motion for class certification and to amend the complaint, the District Court, Neaher, J., held that the United States Supreme Court's affirmance of dismissal of prior action which challenged the constitutionality, on equal protection and due process grounds, of federal statute exempting state mental hospital patients from receiving medicare and medicaid benefits required dismissal of action against federal officials; Mental Hygiene Law is not unconstitutional as lacking an enforcement mechanism; that claim that state practice of sending involuntary committees to state hospitals while voluntary committees go to psychiatric facilities affording treatment could not be determined on motion to dismiss; and that motion to amend complaint to add different parties and different causes of action would be denied.

Federal defendants' motion granted, state defendants' motion denied, motion to amend, motion to certify a class granted.

#### 1. Courts = 101.5(5)

Even though plaintiffs asserted that they had abandoned their demands for injunctions against enforcement of statutes and sought only declaratory relief, where plaintiffs continued to ask that injunctions be entered enforcing declaratory judgment and sought mandamus to compel federal officer to perform a duty and a temporary restraining order against federal officer, court was compelled to conclude that plaintiffs were using declaratory judgment mechanism merely as a label and were actually seeking injunctions, for purpose of determining whether a three-judge court was required. 28 U.S.C.A. § 1361.

#### 2. Courts = 101.5(1)

Even though declaratory judgment mechanism was merely a label and plaintiffs were actually seeking injunctions against enforcement of statutes, where defendants in motion to dismiss asserted that case was foreclosed by controlling precedent and that a substantial federal question was not raised, three-judge court did not have to be convened to decide issues raised in motion.

#### 3. Courts = 101.5(7)

A single judge, in any case, may determine whether constitutional question is substantial, whether complaint at least formally alleges a basis for equitable relief and whether case comes within requirement of three-judge statute.

### 4. Federal Civil Procedure = 1825

To succeed on motion to dismiss asserting that case was foreclosed by controlling precedent and that complaint did not raise substantial federal question, federal defendants had to establish that plaintiffs' claims were constitutionally insubstantial because prior decisions inescapably rendered the claims frivolous.

#### 5. Courts \$\sigma 96(3)

A summary affirmance by the United States Supreme Court of a case within its obligatory appellate jurisdiction or a summary dismissal for lack of substantial federal question is binding precedent on lower federal court.

#### 6. Courts = 107

A summary affirmance by the United States Supreme Court of a case within its obligatory appellate jurisdiction is a decision on the merits of the issue on appeal although not necessarily an affirmance of the rationale by which the decision was reached.

#### 7. Courts \$36(3)

Even though the United States Supreme Court itself might give a prior summary affirmance less precedential value than an opinion of that Court treating the question on the merits, a lower court is not free to disregard the decision; that privilege lies with the Supreme Court alone.

# 8. Social Security and Public Welfare

Where federal statute excluding state mental hospital patients from receiving medicaid benefits distinguished only between medically indigent persons who required short-term care and those who required long-term care and did not on its face discriminate against blacks or poor persons, patently invidious discrimination did not evolve from the statutory classification. Social Security Act, § 1905(a), (h) as amended, 42 U.S.C.A. § 1396d(a), (h).

# 9. Federal Civil Procedure = 1741

United States Supreme Court's affirmance of dismissal of prior action which challenged the constitutionality, on equal protection and due process grounds, of federal statute excluding state hospital mental patients from receiving medicare and medicaid benefits rendered instant action challenging the constitutionality, on the grounds of equal protection and due process, of statutory exclusion of state hospital mental patients between 21 and 65 years of age from receiving medicaid benefits so insubstantial as to require its dismissal. Social Security Act, § 1905(a), (h) as amended, 42 U.S.C.A. § 1396d(a), (h).

## 10. Federal Civil Procedure € 1750

Although claim against state officials for alleged failure to provide adequate funding for treatment of civilly committed state hospital mental patients was interwoven with claim against federal officials for failure to provide medicaid benefits to such patients, where claim against state officials was also based on state's alleged failure to fulfill constitutional obligation to provide care for civilly committed persons, dismissal of claim against federal officials did not require dismissal of claim against state officials.

## 11. Civil Rights == 13.5(3)

Where state mental hospital patient in action against state officials did not contest appropriateness of his civil commitment but challenged the constitutionality of commitment in state hospital which afforded only custodial care and not treatment, patient's action was not a proceeding for habeas corpus relief so as to require the exhaustion of available state remedies but was more in the nature of a civil rights action to protect constitutional rights violated by state officials under color of law. 42 U.S.C.A. § 1983.

# 12. Courts = 101.5(2, 4)

If injunctive relief is sought on ground that statute cannot constitutionally be enforced against particular person or group, statutory court must be convened but if state officials have misapplied state law by reason of misconstruction or have exceeded their powers a single judge may handle the issue.

Cite as 408 F.Supp. 419 (1976)

#### 13. Courts @101.5(4)

Single judge could determine claim against state officials asserting that certain provisions of the New York Mental Hygiene Law were unconstitutional as applied to involuntarily civilly committed state mental hospital inmates because they did not provide constitutionally required minimally adequate care and treatment, in that any viable claim under law rested on the ground that state officials had misapplied the law or exceeded their powers. Mental Hygiene Law N.Y. §§ 13.01 et seq., 15.01 et seq., 31.01 et seq., 35.01 et seq.

#### 14. Mental Health \$\infty\$51

New York Mental Hygiene Law which provides that a state mental patient shall receive care and treatment suited to his needs and places responsibility upon the Department of Mental Hygiene to provide mentally ill with care and treatment of high quality and effectiveness gives right of treatment to involuntarily civilly committed state mental hospital patients. Mental Hygiene Law N.Y. §§ 7.05(c), 13.01 et seq., 15.01, 15.03, 15.03(a), 31.01 et seq., 35.01 et seq.

#### 15. Mental Health =32

New York Mental Hygiene Law is not unconstitutional as lacking an enforcement mechanism in that it can be enforced by an Article 78 proceeding and by habeas corpus. Mental Hygiene Law N.Y. §§ 13.19, 13.19(a), 13.21, 15.15; CPLR N.Y. 7801 et seq., 7801–7804.

#### 16. States = 21

New York State is not constitutionally mandated to provide services to its citizens.

# 17. Constitutional Law == 242.1(5)

When a state assumes burden of providing care for a dependent group, such as the mentally ill, it cannot, consonant with equal protection, discriminate between similarly situated mentally ill individuals.

# 18. Mental Health ← 255(5)

Involuntary commitment to a mental hospital, involving, as it does, a deprivation of liberty, must be scrutinized under the due process clause. U.S.C.A. Const. Amend. 14.

#### 19. Federal Civil Procedure \$1827

Claim that state practice of sending involuntarily civilly committed individuals to state mental hospitals which afford only custodial care and not treatment while voluntary committees go to psychiatric facilities in general hospitals which afford treatment results in state not fulfilling obligation to the mentally ill and not treating similarly situated mental patients in evenhanded manner could not be determined summarily on a motion to dismiss.

#### 20. Federal Civil Procedure = 181

Action asserting the unconstitutionality of state procedures regarding the involuntary civil commitment to state mental hospitals of individuals between ages of 21 and 65 was maintainable as a class action, where claims of named plaintiff were representative of interests of class members and class action was necessary to remove possibility of mootness and assure that not only plaintiff but all those who suffered under same plight would be benefited. Fed.Rules Civ.Proc. rules 23, 23(a), (b)(2), 28 U.S. C.A.

#### 21. Federal Civil Procedure 392

Motions to amend class action complaint would be denied, where amendment sought to add class different from that purported to be represented in class action, add unnecessary new defendants and add cause of action different in nature and purpose from cause asserted in class action. 42 U.S.C.A. § 1983.

Morton Birnbaum, Brooklyn, N. Y., for plaintiffs.

David G. Trager, U. S. Atty., E. D. N. Y., Brooklyn, N. Y., for the Federal defendants by Cyril Hyman, Asst. U. S. Atty.

Louis J. Lefkowitz, Atty. Gen. of N. Y., for New York State Defendants by Ralph L. McMurry, Asst. Atty. Gen., New York City.

408 FEDERAL SUPPLEMENT in a public institution which provides MEMORANDUM AND ORDER purely custodial care.2 NEAHER, District Judge. This individual and class action con-(2) Woe alleges the unconstitutionality cerns the constitutionality of federal and of a State statute against the State de-New York State statutes and State pracfendants. Specifically, Woe attacks protices affecting persons civilly committed visions of the New York State Mental to involuntary confinement in State Hygiene Law for failure to require "ademental institutions. Since the inception quate active care and treatment" and to of the action plaintiffs have filed one provide a means to enforce the alleged amended complaint and have sought right to treatment.3 leave to amend the complaint to add new individual and classes of defendants, new (3) Woe alleges the unconstitutionality classes of plaintiffs and new claims for of the federal Medicaid statute against relief, and defendants have filed motions the federal defendants. Specifically, to dismiss. In order to keep the myriad Woe claims that the exclusion of inmates claims and potential parties as distinct as of State mental institutions who are bepossible the court will first deal with the tween the ages of 21 and 65 from the matters relating to the original amended benefits of Medicaid coverage, 42 U.S.C. complaint. § 1396d(a), is unconstitutional.4 I. Plaintiffs requested declaratory judgnents as to the unconstitutionality of (a) Plaintiffs Walter Woe and Wilma Woe, his mother and guardian,1 seek to State practices in involuntary commitments, (b) the pertinent provisions of the represent patients between the ages of 21 and 65 who are involuntarily civilly State Mental Hygiene Law, and (c) the committed in public mental institutions. Medicaid exclusions for patients in State mental hospitals, and preliminary and As the court understands the allegations permanent injunctions to enforce the dein the complaint, plaintiffs raise the folclaratory judgments.5 lowing claims for relief: (1) Woe raises a two-prong constitu-Plaintiffs' motion for class certificational claim against the State defendtion was denied without prejudice to reants. First, Woe claims that as an involnew pending the determination whether a three-judge court should be convened untarily civilly committed mental patient he has a constitutional right to treatpursuant to the demand for injunctions against enforcing the federal and State ment and that his confinement in a statutes.6 Plaintiffs now assert that State mental institution which affords they have abandoned their demands for him only custodial care violates his injunctive relief and seek only declaratorights under the equal protection and ry judgments from this court. Theredue process clauses. Second, Woe claims fore, they argue, a single judge may adethat, as part of the right to treatment. quately dispose of their claims, strongly he has a constitutional right to confineurging that nothing impedes class certiment in a general hospital which provides psychiatric services and not merely fication. 4. Amended Complaint, supra n. 2, at 22; 1. Plaintiffs have been granted permission to Memorandum in Opposition, supra n. 2, at 11. use pseudonyms. 2. Amended Complaint, filed August 15, 1975, 5. Amended Complaint, supra n. 2, at 2, 56-57. pp. 9-10; Memorandum of Law in Opposition to Motions to Dismiss, filed September 25, 6. Memorandum Order of July 31, 1975. 1975, p. 10. Amended Complaint, supra n. 2, at 15; Memorandum in Opposition, supra n. 2, at 10Cite as 408 F.Supp. 419 (1976)

[1] Despite plaintiffs' arguments, the court is not convinced that plaintiffs have abandoned the injunction aspects of their case. They explicitly request convening a three-judge court in their complaint.7 They continue to ask that "preliminary and permanent injunctions be entered enforcing these declaratory and other judgments." 8 In contrast, see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (single judge may grant non-coercive declaratory relief). They also seek mandamus, a form of injunction, in the nature of compelling an officer of the United States to perform a duty, 28 U.S.C. § 1361.4 The court notes that Kantrowitz v. Weinberger, 388 F.Supp. 1127 (D.D.C.1974), which also tested the constitutionality of Medicaid exclusions, was an action "in the nature of mandamus and for declaratory judgment" and was decided by a three-judge court. Finally, in a related pending motion,10 plaintiffs have already come into court for a temporary restraining order against the Secretary of Health, Education and Welfare (HEW) on grounds of unconstitutionality of a federal statute and have asserted they will seek a preliminary injunction in that matter. The court is compelled to conclude that plaintiffs are using the declaratory judgment mechanism merely as a label and are actually seeking injunctions against enforcement of federal and State statutes. Thus, this remains an action in which a three-judge court may be required.

- 7. Amended Complaint, supra n. 2, at 2.
- 8. Id. at 57.
- 9. Id. at 2.
- Order to Show Cause and Temporary Restraining Order, dated November 18, 1975.
   See Part II of this Opinion.
- 11. Named as defendants are David Mathews, the Secretary of HEW, and the United States.
- 42 U.S.C. § 1396d(a) provides in pertinent part:

"(a) The term 'medical assistance' means payment of part or all of the cost of the following care and services for individuals who are—

"(i) under the age of 21,

[2,3] Even assuming, however, that plaintiffs are correct and a statutory court is unnecessary, defendants have raised issues in their motions to dismiss which, if decided in their favor, would obviate any necessity for a three-judge court. A single judge, in any case, may determine

"(1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case comes within the requirement of the three-judge statute." Abele v. Markle, 452 F.2d 1121, 1125 (2 Cir. 1971).

Thus the court turns to a consideration of federal and State defendants' motions to dismiss the complaint.

# A. Federal Defendants' Motions to Dismiss

his claim against the federal defendants, II plaintiff Woe, a 26-year old inmate of Brooklyn State Hospital, a New York State mental institution, attacks the exclusion of inmates of State institutions who are between the ages of 21 and 65 from Medicaid coverage, Title XIX of the Social Security Act as amended, 42 U.S.C. § 1396d(a). That section defines "medical assistance" for purposes of State eligibility for Medicaid payments in such a way as to provide reimbursement for services in mental institutions only for patients who are under age 21 or 65 or older. II. Thus pa-

"(iii) 65 years of age or older,

"(v) permanently and totally disabled "but whose income and resources are insufficient to meet all of such cost—

"(1) inpatient hospital services (other than services in an institution for mental diseases);

"(4)(A) skilled nursing facility services (other than services in an institution for mental diseases); tients, such as the plaintiff, who are between 21 and 65 are ineligible for medical assistance under the Medicaid statute. In contrast to the provisions excluding mental institutions, the statute does permit medical assistance to individuals, otherwise eligible, for psychiatric services received in general hospitals irrespective of age. It is this "discrimination" between patients in State mental institutions not receiving Medicaid funds and those in psychiatric facilities in general hospitals, or other Medicaid covered programs, of which plaintiffs chiefly complain.

[4] The federal defendants have moved to dismiss the complaint on the grounds, inter alia, that plaintiffs' case is foreclosed by controlling precedent and the complaint should be dismissed for lack of a substantial federal question. Defendants to succeed must establish that plaintiffs' claims are "constitutionally insubstantial," because "prior decisions inescapably render the claims frivolous." Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 859, 35 L.Ed.2d 36 (1973): Maggett v. Norton, 519 F.2d 599, 602 (2 Cir. 1975); Brook Hollow Associates v. J. E. Greene, Inc., 389 F.Supp. 1322, 1327 (D.Conn.1975).

The court believes the federal defendants have met their burden, for as stated by them, "this case is on all fours, factually and legally, with Legion v. Richardson, 354 F.Supp. 456 (S.D.N.Y.1973), arfirmed sub nom. Legion v. Weinberger, 414 U.S. 1058, 94 S.Ct. 564, 38 L.Ed.2d 465 (1973) [hereinafter "Legion"]: and

"(15) intermediate care facilities services (other than such services in an institution for . . . mental diseases);

"(16) . . . inpatient psychiatric hospital services for individuals under age 21

"except as otherwise provided in paragraph (16), such term does not include—

.

"(A) any such payments with respect to or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

"(B) any such payments with respect to care or services for any individual who has

Legion is itself a binding precedent on this court." 13

[5] Contrary to plaintiffs' assertions, it is the rule of this circuit that a summary affirmance by the United States Supreme Court of a case within its obligatory appellate jurisdiction is precedent binding on a lower federal court. Mercado v. Rockefeller, 502 F.2d 666, 673 (2 Cir. 1974); Doe v. Hedgson, 344 F.Supp. 964 (S.D.N.Y.1972), aff'd, 478 F.2d 537 (2 Cir. 1973), applic. dismissed & reaff'd, 500 F.2d 1206 (2 Cir. 1974).

[6, 7] A summary affirmance is a decision on the merits of the issues on appeal, Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247, 79 S.Ct. 978, 3 L.Ed.2d 1200 (1959); Mercado v. Rockefeller, supra, although not necessarily an affirmance of the rationale by which the decision was reached, Fusari v. Steinberg, 419 U.S. 379, 95 S.Ct. 533, 541, 42 L.Ed.2d 521 (1975) (Burger, C. J., concurring). Even though the Supreme Court itself might give a prior summary affirmance less precedential value than an opinion of that Court treating the question on the merits, Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 1359 & n. 14, 39 L.Ed.2d 662 (1974), it does not follow that a lower court is free to disregard the decision. Instead this privilege lies with the Supreme Court alone. Doe v. Hodgson, supra, 500 F.2d at 1207-08.

Thus if Legion v. Richardson is a decision squarely on point, the affirmance of the dismissal of that complaint renders the plaintiffs' case so insubstantial that

not attained 65 years of age and who is a patient in an institution for inental diseases."

 Memorandum in Support of Federal Defendants' Motion to Dismiss filed September 15, 1975, p. 20.

14. Similarly, a summary dismissal for lack of a substantial federal question. See United States ex rel. Epton v. Nenna, 446 F.2d 363 (2 Cir.), cert. denied, 404 U.S. 943, 92 S.Ct. 282. 30 L.Ed.2d 265 (1971); Heaney v. Allen. 425 F.2d 869 (2 Cir. 1970); Port Authority Bondholders Protective ammittee v. Port of New York Authority, 361 F.2d 259, 262 & n. 3 (2 Cir. 1967).

it must be dismissed. Plaintiffs have argued that *Legion* is distinguishable in that the class to be represented and the claims raised by Woe are different and the standard applied in *Legion*, in light of new "evidence," was erroneous. The court cannot agree with plaintiffs that *Legion* is either factually or legally distinguishable.

Legion was an attack on equal protection and due process grounds of the exclusion of State mental patients from both Medicare and Medicaid benefits. John Legion was an inmate of Brooklyn State Hospital who, with other plaintiffs, sought to represent the class of all mentally ill Americans confined in public institutions, including both the mentally ill and retarded. Woe likewise is an inmate of Brooklyn State Hospital, but plaintiffs have pared down the prospective class to consist only of those between ages 21 and 65 in State mental hospitals.15 Legion alleged the unconstitutionality of both Medicare and Medicaid; Woe challenges the Medicaid exclusion alone. It is nonetheless clear that the class and claims presented by Woe are no more than subsets of those in Legion.16 The essential elements of Legion and Woe are identical-constitutional attacks on an exclusion based on institutional status and type of disease. See Kantrowitz v. Weinberger, supra, at

In holding the challenged federal legislation constitutionally valid and dismissing the complaint on the merits, Legion applied the standard of review when a public welfare legislative classification is attacked, stating:

- 15. The smaller class still represents all State mental patients excluded from benefits. In 1972, after the decision in *Legion*, the statute was amended to provide Medicaid coverage for those under age 21. See 42 U.S.C. § 1396d(h). The issue of discrimination based on age has not been raised by Woe, and in any event, was tendered in *Kantrowitz v. Weinberger*, 388 F.Supp. 1127 (D.D.C.1974), and decided on the merits adversely to claimants.
- Although plaintiffs demand benefits for State mental patients only if they receive "ac-

"Where a statutory classification is not conceived on peculiarly suspect grounds such as wealth or race, all that is constitutionally required is that the challenged classification or restriction bear a reasonable relationship with the objectives sought to be fulfilled by the legislation. See, e. g., McDonald v. Board of Elections Com'rs. of Chicago, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969)." Legion v. Richardson, supra, at 459.

The court then reasoned that a rational justification for the exclusions could be found in the Congressional determination that care of the mentally ill in State institutions was within the traditional purview of the States and should remain so. Id. See U.S.Code Cong. & Admin. News, pp. 2034–87 (1955). The classification, even if imperfect, see Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), was nonetheless found constitutional. Id.

[8] Plaintiffs have now come forward to argue that Legion applied the wrong standard of review in that the Medicaid exclusion results in arbitrary and invidious discrimination against the poor and the black and assert that there exists evidence in the form of medical and sociological data, not available when Legion was decided, that the statute discriminates against the socially disadvantaged.17 It does not appear to this court, however, that plaintiffs' contentions are any more substantial than those presented in Legion. Plaintiffs do not assert a racially discriminatory motive on the part of Congress, see Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32

tive and adequate" and not merely "custodial" care, they add nothing new to their argument. Medicald benefits, whether for medical or psychiatric services, are designed to accrue only to those receiving active care and treatment. If State mental patients were eligible, the institutions would still have to conform to an approved State plan. See, e. g., 42 U.S.C. § 1396d(d) and (h); see generally, id. § 1396a.

Amended Complaint, supra n. 2, at 46-53;
 Memorandum in Opposition, supra n. 2 at 23.

L.Ed.2d 285 (1972), nor is it the function of this court to consider anew the rational judgment of Congress and to require reexamination of a precedent so squarely controlling as is Legion. See Dec v. Hodgson, supra, 344 F.Supp. at 968. Where, as here and as set forth in Legion, "the challenged legislation distinguishes between medically indigent persons who require short-term care and those who require long-term care, and does not on its face discriminate against blacks or poor persons [the court cannot] conclude that a patently invidicus discrimination evolves from this class ation." Id. at 459.

[9] To paraphrase Judge Frankel in Doe v. Hodgson, supra, 344 F.Supp. at 968, "[h]owever it might be viewed as a legislative proposition, and however it might fare were it a new question for the courts, plaintiffs' complaint is defeated by the decision" in Legion v. Weinberger, 414 U.S. 1058, 94 S.Ct. 564, 38 L.Ed.2d 465 (1973), summarily affirming Legion v. Richardson, 354 F.Supp. 456 (S.D.N.Y.1973). Plaintiffs' federal claims are therefore rendered insubstantial and the federal defendants' motions to dismiss that part of the amended complaint will be granted.

#### B. State Defendants' Motions to Dismiss

The original amended complaint names the State of New York and the following State officials as defendants: the Governor of New York, the Commissioner of New York State Department of Mental Hygiene and the Director of Brooklyn State Hospital. Plaintiffs raise therein both (1) the constitutionality of a State statute, the New York Mental Hygiene Law, and (2) purely constitutional claims revolving around a "right to treatment."

[10] At the outset the State defendants contend that plaintiffs' allegations are specious in that plaintiffs' sole substantial complaint is the deprivation of Medicaid payments under the alleged constitutionally defective Medicaid exclusion of mental institutions.16 It is true that plaintiffs couple the alleged failure of the State to provide adequate treatment of State mental patients with inadequate funding and emphasize that the availability of Medicaid to mental institutions would provide the State with the requisite funds, ipso facto raising the standard of care. Nevertheless, it cannot be said that plaintiffs have abandoned their claims that the State itself has the constitutional obligation to provide whatever is necessary to insure adequate and active care co individuals it has voluntarily committed to State hospitals.19 Hence, it would be unfounded to identify these claims as illusory.

[11] The State defendants also contend that plaintiff Woe is petitioning for a writ of habeas corpus and therefore must first exhaust available State remedies. Plaintiffs, however, do not contest the appropriateness of civil commitment by reason of mental illness and their claims more properly are characterized as actions to protect their constitutional rights, violated by defendants under color of law, for which they need not first seek redress in a State forum. 42 U.S.C. § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)

### 1. Unconstitutionality of New York Mental Hygiene Law

Plaintiffs' initially considered claim against the State defendants asserts that

"Articles 13, 15, 31 and 35 of the New York Mental Hygiene Law [NYMHL] are unconstitutional as applied to Woe and other involuntarily civilly committed inmates of state mental hospitals as these statutes neither provide nor require the constitutionally required

18. Memorandum of Law in Support of State efendants' Motion to Dismiss, filed September 13, 1975, at 3-5.

19. Memorandum in Opposition, supra n. 2, at

C-6

again determine when the unconstitutionality of a State statute has been alleged whether a three-judge court is required. If injunctive relief is sought on the ground that a statute cannot constitutionally be enforced against a particular person or group, the statutory court must be convened. See Dept. of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966). But if State officials have misapplied State law by "reason of misconstruction or have exceeded their powers, a single judge may handle the issue." Rakes v. Coleman, 318 F.Supp. 181, 189 (E.D.Va. 1970). Plaintiffs have not stated a substantial claim with respect to the constitutionality of the statute. Although couched in terms of constitutional defects, any viable claim under the Mental Hygiene Law would necessarily rest on the second ground. Plaintiffs have not raised this issue.

treatment." 20

[14] Plaintiffs first deplore the absence of a statutory right to treatment, and argue its absence makes the law unconstitutional. As the State defendants point out, any constitutional right would exist irrespective of the statutory provision. See Welsch v. Likins, 373 F.Supp. 487 (D.Minn.1974). Moreover, the State defendants have in fact admitted there exists a right to treatment in the statute, NYMHL §§ 15.01, 15.03.21 It also appears to the court that NYMHL § 15 .-03 does exhibit a legislative intention to provide treatment to the mentally ill, even if the contours of that right have not been concretely defined. That section provides:

"Each patient in a facility and each person receiving services for mental disability shall receive care and treat-

sponsibility for seeing that" the mentally ill, among others within its jurisdiction, "are provided with care and treatment, that such care and treatment is of high quality and effectiveness, and that the personal and civil rights of

persons receiving care and treatment are adequately protected." NYMHL

§ 7.05(c).

New York courts in similar contexts have ruled this provision incorporates a right to treatment. Renelli v. Department of Mental Hygiene, 73 Misc.2d 261, 340 N.Y.S.2d 498, 500 (Sup.Ct.1973) (mentally retarded child); In re S, 78 Misc.2d 351, 356 N.Y.S.2d 768 (Fam.Ct. 1974) (dangerous mentally ill child); and have recognized that "[b]y provisions of Constitution and statute (N.Y.Const., art. XVII, § 4; new Mental Hygiene Law, § 1.03 et seq.; . . .), the State is responsible for the 'care, treatment, rehabilitation, education, and training of the mentally ill'." Kesselbrenner v. Anonymous, 83 N.Y.2d 167, 350 N.Y.S.2d 889, 893, 305 N.E.2d 903 (Ct.App.1973) (dangerously mentally ill). See also Usen v. Sipprell, 71 Misc.2d 633, 335 N.Y. S.2d 848 (Sup.Ct.1972).

[15] The plaintiffs also assert that the statute lacks any enforcement mechanism, and therefore the "right to treatment" is merely precatory.22 It is sufficient to note the existence of possible statutory enforcement means: (1) an Article 78 Proceeding, CPLR §§ 7801-04; see Renelli v. Dept. of Mental Hygiene, supra; and (2) Habeas Corpus, NYMHL § 15.15; even assuming plaintiffs are correct, and it is doubtful, that NYMHL §§ 13.19, 13.21, which provides that

ization of the Mentally Ill; Art. 35-Admission of Alcoholics to Alcoholism Facilities.

21. Memorandum of State Defendants, supra n.

11/2

20. Amended Complaint, supra n. 2, at 15. See id. at 16, 56. The challenged Articles are the following: Art. 13-Regulation and Quality Control of Services for the Mentally Disabled; Art. 15-Rights of Patients; Art. 31-Hospital-

"No individual who is or appears to be mentally disabled shall be detained. deprived of his liberty, or otherwise confined without lawful authority, or inadequately, unskillfully, cruelly, or unsafely cared for or supervised by any person." NYMHL § 13.19(a) (emphasis supplied).

and which provides for enforcement of this section by an action in New York State Supreme Court, NYMHL § 13.21, is inadequate.

The New York Mental Hygiene Law does afford the "right to care and treatment" for the mentally ill by explicit provision and New York Law does provide and has been employed to enforce that right. Plaintiffs have thus failed to sufficiently allege a claim for relief on the asserted grounds of unconstitutionality of the New York statute.

#### Constitutional Claims

The court now comes to what it conceives to be the heart of plaintiffs' case. Plaintiffs seek to end a self-styled "twotiered" system of mental care in which. they allege, some persons, those voluntarily admitted to mental hospitals, receive care in equipped facilities and the remainder, involuntary committees, are condemned to custodial care in State mental institutions.

They have constructed the following argument. An involuntarily committed mental patient has a right, under the due process clause, to adequate treatment. Wyatt v. Stickney, 325 F.Supp. 781 (M.D.Ala.1971), implemented in 344 F.Supp. 373 (1972); aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5 Cir. 1975). Involuntarily civilly committed patients are only sent to State mental institutions; voluntary committees go to psychiatric facilities in general hospitals. Patients in State mental institutions do not receive adequate treatment; patients in general hospitals do receive treatment. Therefore patients in State mental institutions have a right to be committed in general hospitals with ademum, to adequate care and treatment in State institutions.

At bottom this court understands that plaintiffs seek to obtain treatment allegedly not now provided by the State by (1) the State's assumption of the burden to improve care and provide treatment in State institutions, equalizing the standard of psychiatric care between those confined within and without State institutions, or (2) a change in State practices in involuntary commitments from State institutions to other facilities. namely those which provide treatment.

[16, 17] The court finds no basis in law for the allegation that, without more, involuntary committees possess the constitutional right not to be committed to State mental institutions, if the State is not discriminating between similarly situated mentally ill individuals in its provision of services or funds. New York State is not constitutionally mandated to provide services to its citizens. Cf. Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.24 491 (1970). New York Association for Retailed Children, Inc. v. Rockefeller, 357 F.Supp. 752, 761 (E.D.N.Y.1973); see Welsch v. Likins, supra, at 493. But when a State does assume the burden of providing care for a dependent group, such as the mentally ill, it cannot consonant with the equal protection clause discriminate among those similarly situated mentally ill. See New York Association for Retarded Children, Inc. v. Rockefeller, supra, at 762; cf. Montoroula v. Parry, 373 N.Y.S.2d 980 (Sup.Ct.1975).

[18], Involuntary commitment to a mental hospital, involving, as it does, a deprivation of liberty, must be scrutinized under the due process clause. O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 2496, 45 L.Ed.2d 396 (1975). The right to a humane and safe living environment, Welsch v. Likins, supra at 502-03, the right to the least restrictive alternative in confinement, id., at 501, the right to be protected from harm, New York Association for Retarded Chilquate funds for treatment, or, at a mini- dren, Inc. v. Rockefeller, supra, at 764,

22. Amended Complaint, supra n. 2, at 19.

WOE v. MATHEWS Cite as 408 F.Supp. 419 (1976)

ligation of the State not to "confine without more a nondangerous individual who is capable of surviving safely in freedom by himself" or with the help of others, O'Connor v. Donaldson, supra, 95 S.Ct. at 2494, have each been recognized by courts for those civilly confined under State authority.23

[19] Whether the State of New York has met its constitutional obligations. whether it has treated similarly situated mental patients in an evenhanded manner, and whether it has provided adequate conditions in confinement are issues which cannot be summarily determined. As a tentative formulation it would seem encumbent upon the State as confiner to minimize the mode of confinement, Welsh v. Likins, supra, and to employ whatever means are necessary. including such care and treatment as are reasonably possible in the circumstances of the case, to promote the speedy release and return to liberty of the person confined. The State defendants' motions to dismiss the constitutional claims are therefore denied.

#### C. Class Action Certification

Plaintiffs have cast this suit in the form of a class action and have repeatedly urged that certification as such be granted. F.R.Civ.P. 23. Having determined that a three-judge court is not required in this matter, plaintiffs' motion is now properly before this court for determination. The class sought to be represented is that of "involuntarily civilly committed mental hospital patients and their guardians." 24 Plaintiffs argue a class action is necessary to remove any

23. The asserted "right to treatment" has not been universally recognized by courts. The Supreme Court in O'Connor v. Donaldson, supra, explicitly refused to affirm the existence of such a right. The difficulties are legion in assessing a "right to treatment" from defining mentally ill, adequacy or treatment itself, to determining whether treatment is necessary or helpful or the condition is incurable, and to setting standards of care. See id. (Burger, C. J., concurring). The statement of dollar figures cannot adequately describe or set the

and, most recently, the constitutional ob- possibility of mootness and to assure that not only will plaintiff Woe be benefited but all those who suffer under the same plight.25 Defendants have objected that prerequisites of F.R.Civ.P. 23(a) have not been met in that the class is not adequately defined, the interests of the members are antagonistic or diverse and a class action is not necessary.

> [20] The court has decided to certify a Rule 23(b)(2) class, F.R.Civ.P., limited to the class of all persons between the ages of 21 and 65 who are or who will be involuntarily civilly committed to New York State mental institutions.

> Maintenance of the class will insure that not only is the representative a member of the class at the time the action was brought and the class was certified but also at the time a disposition on the merits is reached. See Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). The court further believes Woe's claims to be representative of the interests of the involuntarily committed mentally ill and in toto the tests are met. Accordingly, the court hereby certifies the above named class of plaintiffs.

#### II.

[21] Other matters for disposition at this time are several motions of plaintiffs to amend their complaint. These motions would add new plaintiffs, defendants and causes of action. The court has decided to deny, without prejudice, the motions to amend.

First, plaintiffs attempt to add a new class of plaintiffs to be represented by Frank Foe, on a new claim against the Secretary of Health, Education and Wel-

standards of care: an amount of money spent is merely evidence of what may be constitutionally necessary. But although "adequacy" clearly depends on the circumstances of the case, purely custodial care must, in almost all situations, be considered inadequate.

- 24. Amended Complaint, supra n. 2, at 7, ¶ VIII.
- 25. Plaintiffs' Second Memorandum in Support of Motion to Maintain a Class Action, filed July 25, 1975, at 2, 11-12.

fare (HEW). The claim asserts the unconstitutionality of the federal requirement of accreditation of mental institutions by the Joint Commission on Accreditation of Hospitals (JCAH) as a condition precedent to patients' eligibility for a monthly stipend for "personal comfort items" under the federal Supplemental Security Income (SSI) program, Title XVI of the Social Security Act as amended, 42 U.S.C. § 1382(e)(1)(B); 20 C.F.R. § 405.1036(a).

The motion to amend was brought on by order to show cause with an application for a temporary restraining order to prevent the Secretary of HEW from sending a letter of intent to the inmates of Pilgrim Psychiatric Center advising that they might become ineligible for the SSI payments due to the loss of accreditation by the institution. The court heard argument on the matter as it was asserted as part of the Woe complaint, although plaintiffs sought relief on behalf of what was disclosed to be a different class of patients-those over age 65 who stood to lose the SSI stipend. The court, in a written order, denied the temporary restraining order on the grounds that plaintiffs had demonstrated neither the existence of irreparable injury nor possibility of success.26

The foregoing decision did not touch the merits of the new claim and no amendment of the complaint was accepted by the court. The alleged unconstitutionality of the SSI program involves claims different in nature and purpose than those which Woe has attacked, and a class different from that Woe purports to represent. Accordingly, a consolidation of such different claims and parties in the Woe action is not warranted.

Second, the motion to add new defendants presented at that time is also denied. Having been informed of the stipulated transfer of a similar action, Yoe v. Kolb, from the Southern District of New York to this court and the probable consolidation of that action with the

present one, in which all intended State defendants would be named, the court perceives no reason to name new State defendants at this time.

Third, inasmuch as plaintiffs' motion to add new plaintiffs George Goe and Harry Hoe introduces the same class as that sought to be represented by Frank Foe and the prior amendment has been denied, the instant motion is likewise denied without prejudice. Goe and Hoe. like Foe, are inmates of Pilgrim Psychiatric Center over age 65 and their claims more properly should be considered with those of Foe. In view of the denial of the motion to amend, plaintiffs' application to allow the use of the pseudonyms George Goe and Harry Hoe, which otherwise would have been readily granted, is denied.

Fourth, plaintiffs' motion to add new defendants, the JCAH and certain officers and directors thereof, and a new claim for relief, a conspiracy among the JCAH and State and federal defendants to violate plaintiffs' civil rights, 42 U.S.C. § 1983, is denied. The claim alleges disparity in accreditation standards used by the JCAH in public and non-public institutions and the diversion of funds to "almost total non-State mental hospital purposes." 27 The "funds" involved appear to be the federal Medicaid and SSI payments presumably destined for those aided under the statute, patients in mental institutions under 21 and over 65 years of age. The claim concerns those patients who do benefit from federal Medicaid and SSI payments, the members of a class distinct from Wee. Even if the proposed classes do have members in common, this new claim will be better examined in a separate action as it raises decidedly new issues and a different array of defendants, including federal and State officers and private individuals.

In sum, despite the liberality with which proposed amendments to complaints are to be viewed, F.R.Civ.P. 15(a), the proffered additions to the com-

26. Memorandum and Order of November 20, 27. See Notice of Motion filed December 8, 1975.

Cite as 408 F.Supp. 431 (1975)

plaint here would unjustifiably interject entirely disparate issues into and tend to obfuscate the not insubstantial and difficult questions presented in the main lawsuit. The interests of neither the economy of litigation nor the forthright presentation of Woe's claims would be served by the fusion of inherently distinct claims and parties. The court thus adheres to its decision to deny, without prejudice, the motions to amend the complaint in their entirety.

Accordingly, the federal defendants' motion to dismiss the complaint as to those defendants is granted, the State defendants' motion to dismiss the complaint as to them is denied, plaintiffs' motion to amend the complaint is denied, and their motion to certify a class pursuant to Rule 23(b)(2), F.R.Civ.P., is granted but limited to the class of persons between the ages of 21 and 65 who are or who will be involuntarily civilly committed to New York State mental institutions.

So ordered.



INTERNATIONAL TRAVEL ARRANGERS, Plaintiff,

WESTERN AIR LINES, INC., Defendant.

No. Civ. 4-74-256.

United States District Court, D. Minnesota, Fourth Division.

March 5, 1975.

Air charter arranger brought antitrust action against airline, and airline moved to dismiss on ground of exclusive jurisdiction in the Civil Aeronautics Board or to stay proceedings pending referral to the CAB under the doctrine of primary jurisdiction. The District Court, Miles W. Lord, J., held that the issues raised by the antitrust damage action were not within the exclusive or primary jurisdiction of the CAB where the CAB did not have the power to, and had not attempted to, immunize from the antitrust laws alleged conduct of airline in inducing and coercing an organization to refrain from doing business with plaintiff and in allegedly conducting a misleading and deceptive advertising campaign against plaintiff.

Motion denied.

1. Monopolies 4=16(1)

Alleged conduct of airline in inducing and coercing organization not to do business with an air charter arranger and in allegedly conducting a misleading and deceptive advertising campaign against arranger did not come within the antitrust immunity provisions of section 414 of the Federal Aviation Act, particularly where travel group charter regulations specifically provided that relief granted thereby should not constitute an order within section 414 and should not confer any antitrust immunity. Federal Aviation Act of 1958, §§ 408, 409, 412, 414, 49 U.S.C.A. §§ 1378, 1379, 1382, 1384.

2. Monopolies ←16(1)

Statute and regulation prohibiting unfair and deceptive practices in the air transportation industry and giving the Civil Aeronautics Board power to investigate and put a stop to such practices do not grant power to the CAB to confer antitrust immunity with respect to conduct of airlines, particularly since the regulation applies only to charter organizers. Federal Aviation Act of 1958, § 411, 49 U.S.C.A. § 1381.

3. Aviation =31

Civil Aeronautics Board did not have exclusive jurisdiction over controversy in which an air charter arranger sought damages under the Sherman Antitrust Act for alleged conduct of airline in inducing and coercing organization from doing business with arranger and allegedly conducting a misleading and de-

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN LEGION (a pseudonym), by his mother and guardian RUTH LEGION (a pseudonym), and by his grandmother and guardian ALICE LEGION (a pseudonym); LILLIAN HOSTS (a pseudonym), by her mother and guardian LILA HOSTS (a pseudonym); and RICHARD ARMIES (a pseudonym), on behalf of themselves and all others similarly situated, to wit the 116,000 other patients treated annually in New York public mental institutions and the 1,000,000 other patients treated annually in American public mental institutions,

Plaintiffs,

#### -against-

ELLIOT RICHARDSON, Secretary of the United States Department of Health, Education and Welfare, individually and in his official capacity; ELMER W. SMITH, Regional Commissioner of the Social and Rehabilitation Service, United States Department of Health, Education and Welfare, individually and in his official capacity; JOSEPH J. KELLY, Regional Commissioner of the United States Social Security Administration, individually and in his official capacity; the UNITED STATES OF AMERICA; NELSON J. ROCKE-FELLER, Governor of the State of New York, individually and in his official capacity; ALAN D. MILLER, M.D., Commissioner of the Department of Mental Hygiene for the State of New York, individually and in his official capacity; MORTON B. WALLACH, M.D., Director of Brooklyn State Hospital, individually and in his official capacity; JACK HAMMOND, M.D., Director of Willowbrook State School, individually and in his official capacity; and THE STATE OF NEW YORK,

0

Defendants.

72 Civil Action File No. 2576

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

CLASS ACTION

Appendix D-1

# PRELIMINARY STATEMENT

I. This is a class action on behalf of 1,000,000 severely mentally disabled Americans—the 850,000 patients treated annually in our public hospitals for the mentally ill and the 150,000 residents of our state hospitals and schools for the mentally retarded who constitute the most disabled, the most chronically ill, the sickest, the most rejected, the most defenseless, the most abandoned, the poorest, the most helpless and the most discriminated against discrete and insular minority in the United States today.

Although these 1,000,000 Americans have a constitutional right to adequate care and treatment, they usually receive inadequate care and treatment—both in New York and throughout the nation—due primarily to insufficient state appropriations. At present these public mental institutions are supported almost totally by non-federal funds.

Both in New York and generally throughout the nation, there is no plan to increase these insufficient funds to needed proper levels. In order, therefore, to provide the constitutionally required level of adequate care for these 1,000,000 Americans treated annually in our public mental institutions, increased funds must be obtained, and primarily from the federal government.

The purpose of this action is to adequately financially implement the constitutional right of these 1,000,000 Americans to adequate care and treatment by the obtaining of \$1.5 billion in federal benefits under Medicaid and Medicare legislation so as to improve the usually inadequate care now being given to these 1,000,000 patients by the states.

Present Medicaid and Medicare legislation,
Titles XIX and XVIII, respectively, of the Social Security Act
of 1935, as amended, specifically excludes almost all of these
1,000,000 Americans from its benefits; however, while specifically excluding these 1,000,000 patients who constitute our
sickest and poorest mentally disabled solely because they are
patients in public mental institutions, this same legislation
grants comprehensive benefits to the smaller number of mentally
disabled who are patients in private and voluntary mental
institutions. This latter group of patients are wealthier and
less mentally disabled than are the much larger group of public
mental institution patients. In addition, all medical and
surgical patients in public, voluntary, and private hospitals
are eligible for Medicaid and Medicare benefits if they
qualify.

1

At the present time, however, the public mental institution patients do not ask that they be integrated with private and voluntary hospital mental patients. They ask only that the present separate, unequal and inferior standards for public mental facilities be abolished and that these 1,000,000 Americans receive a level of care in public facilities equal to that routinely provided in non-public mental facilities that do receive Medicaid and Medicare funds.

Accordingly, the plaintiffs ask that all Medicaid and Medicare legislation be declared unconstitutional because these statutes arbitrarily exclude almost all these 1,000,000 patients from their benefits. Plaintiffs further ask that the entire nation's Medicaid and Medicare programs be immediately halted and fully abandoned so that no American can receive any further benefit from this legislation.

In the alternative, plaintiffs ask that only their morally wrong, economically unnecessary and medically unjustifiable exclusion from these national health care programs be declared unconstitutional, and that they be included in these programs. This will require an increase in present federal Medicaid and Medicare appropriations by approximately 13 percent — or by \$1.5 billion. Through this increased funding, the nation's most important and widespread unsolved problem of medical care—the unmet provision of adequate care and treatment for patients in public institutions for the mentally disabled—can be solved.

Furthermore, as new federal funds for patients in state mental institutions normally would go directly into the state's general funds and be mingled with other revenues from which general funds these new funds could be diverted to other state functions, the plaintiffs are also requesting that the funds be specifically appropriated solely to improve care and treatment in state mental institutions above present inadequate levels. The patients in the state mental institutions are not politically powerful enough to assure that federal funds given to the states for their benefit are actually used by the respective states for public mental institution patients.

Not only are Medicaid and Medicare payments diverted to general state coffers (as the Health and Mental Hygiene Facilities Improvement Corporation in New York) where they are used for purposes other than the direct benefit of the patients for whom they are provided, but payments received directly from patients or from other third party sources on their behalf (e.g. Blue Cross, Group Health Insurance) are similarly diverted. The state defendants further this practice through

their conspiracy with the federal defendants. Thus plaintiffs ask that the State of New York defendants be enjoined from diverting any payments received from patients in public mental institutions or from third parties on their behalf from the care and treatment of patients in public mental institutions.

This lawsuit requires an immediate hearing and determination by this court because, at present, it is certain that this inhumane and unconstitutional discrimination against these 1,000,000 Americans will continue in the foreseeable future. For no member of Congress or of the executive branch of the federal government has suggested that this arbitrary exclusion be ended. Neither has any medical, psychiatric or lay mental health group demanded that this discrimination be ended. Nor has any civil liberties group attacked this segregation of public mental institution patients into separate, inferior and unequal facilities.

Furthermore, the proposals of President Nixon, Senator Kennedy, the American Medical Association and every other proposed plan for the extension of federally subsidized general medical care to additional segments of our population continue to exclude almost all of these 1,000,000 public mental institution patients from their benefits.

It is believed that the constitutional issues presented to this Court in this complaint are novel and have never previously been presented to any court.

# JURISDICTION

II. The plaintiffs' claims arise under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, under Title XVIII of Social Security Act of 1935 as amended, 42 U.S.C. SS1395-1395 11, and, Title XIX of Social Security Act of 1935 as amended, 42 U.S.C. SS1396-1396g, and under 42 U.S.C. SS1983 and 1985.

The jurisdiction of this Court is based upon 28 U.S.C. 881331, 1343(3), and 1361, and the aforesaid Amendments.

The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars (\$10,000.00) for each named plaintiff.

Plaintiffs request declaratory judgments pursuant to 28 U.S.C. §§2201 and 2202, and preliminary and permanent injunctions pursuant to 28 U.S.C. §1651 and 42 U.S.C. §1983 as they have no adequate remedy at law.

Plaintiffs seek injunctive relief restraining the enforcement of certain federal and New York statutes for repugnance to the Constitution of the United States, and therefore, request the convening of a three judge court pursuant to 28 U.S.C. 882281, 2282, and 2284.

## PLAINTIFFS

III. The plaintiffs are:

A. John Legion, a pseudonym, a 30-year-old, severely ill, (probably involuntarily) civilly committed mental patient at the Brooklyn State Hospital, located in Brooklyn, New York, and his mother and guardian Ruth Legion, a pseudonym, and his grandmother and guardian Alice Legion, a pseudonym, who sue on behalf of the other 88,916 patients treated annually in New York state hospitals for the mentally ill and their relatives, and on behalf of all of the other 850,000 patients treated annually in American public mental hospitals and their relatives, He has been so institutionalized since February, 1972.

B. Lillian Hosts, a pseudonym, a 10-year-old severely mentally retarded patient at Willowbrook State School and Hospital located in the County of Richmond, in the State of New York, and her mother and guardian Lila Hosts, also a pseudonym who sue on behalf of the other 26,665 patients treated annually in New York state schools and hospitals for the mentally retarded, and their relatives, and on behalf of all of the other 150,000 patients treated annually in American public institutions for the 'mentally retarded, and their relatives.

Although voluntarily civilly committed since 1967 by her mother, Lillian Hosts is so profoundly mentally retarded, that for all practicable purposes, she--as well as the 150,000 other patients that she represents--should be considered to be involuntarily civilly committed so far as the question of deserving and receiving this Court's protection is concerned.

C. Richard Armies, also a pseudonym, is a seventy-year-old mentally ill patient in Kings Park State Hospital, a public mental institution located in Suffolk County,

in the State of New York. He has been involuntarily civilly committed for the past year, and has been so committed several times previously.

IV. Plaintiffs have standing to bring this action because they are ineligible to receive Medicare and Medicaid benefits solely by virtue of their involuntary civil commitment to state public mental hospitals and a state school for the retarded.

Prior to their hospitalization in New York public mental institutions, John Legion, Richard Armies and Lillian Hosts were all welfare recipients. As such, John Legion, Richard Armies and Lillian Hosts were entitled to full Medicaid benefits, and Richard Armies was also entitled to full Medicare benefits.

At present, Ruth Legion, Alice Legion and Lila Hosts are welfare recipients. All of the plaintiffs are black.

V. The named plaintiffs, and the guardians by and through whom these patients sue, are all residents of the State of New York.

Patients and their guardians sue in their own behalf and, pursuant to Rule 23 of Federal Rules of Civil Procedure, on behalf of other patients and guardians who are so numerous that it is impractical to bring them all before the Court; the questions of law and fact are common to the entire class and the plaintiffs will fairly and adequately protect the interests of the class.

## DEFENDANTS

# VI. The defendants:

A. Elliot Richardson is the Secretary of the United States Department of Health, Education and Welfare, and in that capacity he has been charged with the responsibility for the administration of the programs under Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act of 1935, as amended.

B. Elmer W. Smith is the Regional Commissioner of the Social and Rehabilitation Service of the United States Department of Health, Education and Welfare for Region II, which includes New York, and in that capacity he has been delegated responsibility for administration of the federal program under Title XIX (Medicaid) of the Social Security Act of 1935, as amended.

C. Joseph J. Kelly is the Regional
Commissioner of the United States Social Security Administration
for Region II, which includes New York, and in that capacity
he has been delegated responsibility for administration of
the federal program under Title XVIII (Medicare) of the Social
Security Act of 1935, as amended.

- D. The United States of America.
- E. Nelson J. Rockefeller is the Governor of the State of New York.

F. Dr. Alan D. Miller is the Commissioner of the Department of Mental Hygiene for the State of New York, and in that capacity he is responsible for the administration of the New York laws governing the hospitalization and treatment of the mentally disabled.

G. Dr. Morton B. Wallach is the Director of Brooklyn State Hospital, and in that capacity he has overall responsibility for the management and operation of the hospital.

He is sued in that capacity and as

representative of that class consisting of all other directors of New York public mental hospitals.

H. Dr. Jack Hammond is the Director of Willowbrook State School, and in that capacity he has overall responsibility for the management and operation of the hospital and school.

He is sued in that capacity and as representative of that class consisting of all other directors of New York public hospitals and schools for the retarded.

I. The State of New York.

## CLAIMS FOR RELIEF

VII. In 1965 when Congress passed the original Medicaid and Medicare legislation, it knew that the 1,000,000 Americans treated annually in public mental institutions usually received inadequate care and treatment due to insufficient state appropriations. In spite of this knowledge, Congress chose not to significantly increase the funds for public mental hospital patients, while significantly increasing the funds available for private and voluntary hospital mental patients and for public, voluntary, and private hospital medical and surgical patients.

Recurrently, throughout our nation, cases of poor care in public mental institutions are being constantly brought to public attention in the 1970s, proving again that these problems are neither new nor limited to a few states.

For example, one still finds ratios of one doctor-usually unlicensed-to 800-900 patients in these hospitals in Alabama, Connecticut and Florida.

Massachusetts, a state that was once a national leader in the quality of its state mental hospital care—and that still is a leader in the quality of its general hospitals, medical schools and medical personnel—now leads only in the total number of unlicensed physicians working in these institutions who have not even passed their Educational Council for Foreign Medical Graduates' Examination, which assures only a minimum knowledge of written English and of basic medicine.

Pellagra--a vitamin deficiency disease that itself can cause mental illness--is found among patients in all six mental hospitals in Maryland because of inadequately

financed dietary programs, and while this situation has been temporarily corrected, present appropriations are insufficient to provide adequate food for the rest of the year.

In Ohio, 31 attendants are arrested because of physical and homosexual assaults by aides of both sexes upon patients first tied to doors and made docile by drugs.

In New Jersey, a public mental institution is found so overcrowded and understaffed that it is ordered to stop all admissions, and it responds by increasing its patient load by more than 10 percent and continues to strap and handcuff patients to chairs, beds, radiators and even steampipes, and also chains them to one another—often leaving them completely unattended for as long as 16 hours a day.

And, in New York, ward attendants in a state school for the mentally retarded routinely steal from the helpless mentally and physically disabled children entrusted to their care, the Christmas toys collected by unpaid volunteers and donated by charitable department stores as well as new blankets and other bedding issued to these unfortunate young patients. Elsewhere, in a New York state hospital for the mentally ill, cruel neglect of simple basic physical needs of, and even brutal assaults upon aged, helpless patients by aides are overlooked.

Patients committed to public mental institutions are being irreparably harmed by the insufficient funding of those institutions. In New York, where Medicaid payments can run at least as high as \$150 per day for patients in non-public mental institutions, those patients in public mental institutions are cared for and treated on a small fraction of that amount per day. In fact, the State of New York contributes more money per day to the Medicaid benefits of mental patients in hospitals

like St. Luke's Hospital Center, Columbia Presbyterian Medical Center, Beth Israel Medical Center, Mount Sinai Medical Center, or New York Hospital in New York City than it expends per day for total care and treatment of patients in New York State public mental institutions. (Assuming a \$150 per day Medicaid payment, the State of New York's contribution would be \$37.50--one-half provided by the federal government and one-fourth by the City of New York. This per day charge by the hospital is exclusive of physicians' fees. The total cost to the state for support of a patient in Brooklyn State Hospital, including physicians' fees, was approximately \$23.00 per day for the 1971-72 fiscal year.)

On March 8, 1971, in a letter written to every

New York assemblyman, the defendant, Alan D. Miller, M.D.,

Commissioner of Mental Hygiene of the State of New York opposed

insufficient funding of state mental institutions in the

following terms:

"Dear Assemblyman:

I write to you about a matter of great urgency. The lives and welfare of nearly 90,000 mentally ill and mentally retarded men, women, and children are in danger. The peace of mind of their families is threatened."

Dr. Miller went on to point out the irreparable harm that results from insufficient funding:

"Many patients could not receive needed treatment, many would be poorly cared for, some would die. Thousands of retarded children who cannot feed

themselves would be poorly fed; thousands more would be denied the personal care they need to live under even marginal conditions."

At this point in this discussion, it should be emphasized that no blanket adverse criticism of any public mental institution or of any public mental institution personnel is intended by any comment in this paper, for the inadequate care too often given in these institutions is not usually primarily their doing, but rather is primarily attributable to American society as a whole. We, therefore, should be grateful to, rather than adversely critical of, the personnel who continue to work in these institutions under what, too often, are sorely trying conditions.

The full extent of the problem can better be appreciated by noting that while the total number of resident patients in our state hospitals for the mentally ill decreased from a high of 559,000 in 1955 to 339,000 in 1970, this still means that one of every 593 Americans was a resident patient in these institutions at the end of 1970. Furthermore, in spite of the decreasing number of resident patients by about 39 percent from 1955, the real work of these institutions is increasing. For the number of admissions and readmissions increased from 185,000 in 1956 to about 339,000 in 1970, an increase of about 112 percent, while the number of discharges increased from 145,000 in 1956 to about 400,000 in 1970, an increase of 175 percent. From 1968 to 1970 alone, the number of patients treated annually rose from 800,000 to 850,000.

The time needed for the daily care of first admissions, readmissions and discharges of short-term patients,

whether acutely or chronically ill, is more than the time needed for the daily care of long-term chronic patients; therefore, the burden on the state mental hospital system that treats the sickest, the most disabled and the poorest mental patients is becoming increasingly heavy.

This development is occurring in spite of the continuing increase in the number of community mental health centers, in the number of beds in the psychiatric units of general hospitals and in the number of psychiatric clinics affiliated with general hospitals. These, and other community mental health facilities were originally advocated, and unfortunately still are being advocated, as total substitutes for the state hospital system in spite of the experience of Great Britain and other nations that have shown that community mental health facilities on the present scale do not properly substitute for the public mental hospital. For these community mental health facilities usually treat the less decompensated and less chronically mentally ill who often would not have been referred to a state mental hospital if a community mental health center or general hospital psychiatric unit were not available.

In recent testimony before a Congressional subcommittee, Harry C. Schnibbe, the knowledgeable and outspoken Executive Director of the National Association of State Mental Health Program Directors pointed out that the fact of, and the significance of, this increasingly heavy burden upon the state mental hospital system is too often not appreciated by the public and its representatives:

"There is a totally fallacious notion that pervades Congressional committees in the House and Senate, often fed by misleading assertions and invalid assumptions offered by Department of Health, Education and Welfare witnesses, and usually seconded by gullible organizations who are disinclined to do much independent thinking,—there is a fallacious notion that the state mental hospital system is now being supplanted by other programs and that the system is declining and will soon be dissolved into something else.

The next logical conclusion, after assuming the above premise to be correct, is to reduce or eliminate any finding that supports the state hospital system.

I think we should get the record straight.

If any witnesses come before you (Health, Education and Welfare or public) and state, or imply, that any particular federal program that they are touting is causing a nationwide reduction in the functioning of the state hospital system—then they are fools or liars.

The state hospital system is growing, not declining.

Mr. Chairman, I am not prepared to argue the merits of continued expansion of the state hospital system.

That is for the medical scientists to judge.

I merely wish to point out certain irrefutable facts about the mental health care system in the United States and then ask that the members of Congress view the situation objectively, with their eyes open, and provide federal help where it is needed, and not be misled into erroneously thinking that the mental hospital system at this moment is either (1) not viable and not in need of support, or (2) is not worthy of support.

Let's Look at the Facts

The total number of patients treated last year was 857,510."

At present, it is unlikely that the levels of care for many of the patients treated annually in our state mental institutions will be significantly improved because of an American social, legal and medical tragedy—our society's extra-hospital rejection mechanisms against those mentally disabled treated in our public mental institutions.

A prime example of these rejection mechanisms that exist throughout our entire society is that the often impoverished public mental hospital patient is specifically excluded from general coverage under our Medicaid and Medicare legislation, except for comparatively minor exceptions. These exceptions are applicable only to certain patients over 65 years of age, and amount to less than 10 percent of

the patients treated annually in the state hospitals.

By contrast, the usually less sick, usually less disabled and usually wealthier mental patients in the psychiatric units of general hospitals, if they qualify for Medicaid and Medicare benefits, can receive the same comprehensive benefits available for public, voluntary and private hospital medical and surgical patients. Furthermore, as most voluntary and private mental hospitals are affiliated with a general hospital, their patients can also qualify for these benefits.

Medicare is the federal program for payment for medical care for persons over 65 years of age. It pays from 80-100 percent of the cost of any item of medical care if this care is included under the program. It is fairly comprehensive in most areas, and is available to all who qualify independent of one's wealth.

Medicaid is the federal program for payment for medical care depending upon one's financial need. It covers all ages and can supplement Medicare payments for those over 65 if these persons have inadequate funds for needed care. It requires state contributions of from 25-50 percent of the total expenditures varying with the wealth of the state; e.g., Alabama, a poorer state, contributes only 25 percent while New York, a wealthier state, contributes 50 percent. It is available to all whom the individual state considers cannot meet the cost of needed medical care, can comprehensively cover all included services and pays up to 100 percent of the cost if needed. Individual states can limit the scope and coverage of the various services.

In 1970, the federal government spent almost \$11 billion for these Medicare and Medicaid programs. Only

approximately \$200 million of this expenditure went to the states for the public mental hospital system. If public mental hospital patients were included under the Medicare and Medicaid programs as are all other hospital patients, the federal contribution towards the state hospital system would have been approximately \$1.5 billion. This would have allowed significant needed improvement in the care and treatment of patients in public mental institutions.

Undoubtedly, one of the primary reasons for the exclusion of public mental hospital patients from the original Medicare and Medicaid legislation was that in order to pass these reforms, the estimated costs were kept down by proponents of this legislation by excluding the most helpless and most defenseless group in need of improved medical care. To have included the entire state mental hospital system would have increased estimated costs by approximately 50 percent. Now, however, as the costs of Medicare and Medicaid programs are skyrocketing, to presently include the state hospital system in these programs would only mean an increase of approximately 13 percent of total federal expenditures for these programs. This is not too much to help solve the major unsolved problem in the national medical care scene.

In view of the foregoing, it may not be too surprising to find that the proposals by the American Medical Association, the American Hospital Association, President Nixon, Senator Kennedy and all other plans for the extension of federally subsidized general medical care to other segments of the population, all continue to exclude these patients from general coverage. The Kennedy Plan is sponsored by the Committee for National Health Insurance, a descriptive term for the 100 leaders of American life who sponsored this legislation. The

Committee included leaders of labor such as the late Walter Reuther, president of the United Automobile Workers union, leaders of medicine such as Dr. Michael DeBakey, the heart surgeon and Dr. Howard Rome, the Mayo Clinic psychiatrist and a former president of the American Psychiatric Association, leaders of the lay mental health movement such as Mrs. Mary Lasker and scholars from the academic worlds of law, medicine and other disciplines. Without a dissent, all these 100 leaders of American life backed, as the major exception to a comprehensive national medical care program, the continued exclusion of almost all the 850,000 other Americans who now constitute the primary major unsolved problem of medical care in the United States.

By virtue of the foregoing and because funds for the mentally ill and the mentally retarded in public mental institutions are intermingled, 150,000 Americans treated annually in public mental institutions for the mentally retarded, also are unconstitutionally deprived of adequate funds to obtain proper care.

Therefore, the poorer, sicker, more numerous, often black and usually involuntarily civilly committed public mental institution patients receive irreparable damages to life, liberty and property solely due to inadequate care and treatment compelled by present inadequate state funding. For Congress has invidiously and unconstitutionally chosen to deny equal protection and due process of laws to the plaintiffs by not appropriating Medicare and Medicaid funds so as to improve this inadequate level of care to minimally acceptable constitutionally required levels — even for physical, non-mental illnesses such as appendicitis.

Expectedly, one finds gross negligence of basic physical and mental needs and even unprovoked physical assaults by attendants towards patients such as Lillian Hosts at Willowbrook State School, John Legion at Brooklyn State Hospital and Richard Armies at Kings Park State Hospital.

By contrast, for the less sick, richer, less numerous, rarely black and almost always voluntarily hospitalized non-public mental institution patients being treated in adequately staffed and sufficiently financed non-public mental institutions, Congress chose to appropriate adequate Medicaid and Medicare funds which assures not only the continuance of an adequate level of care and treatment in these institutions, but also an almost irreversible drain of needed professional from inadequately staffed public mental institutions to adequately staffed non-public mental institutions.

# PRAYER FOR RELIEF

# WHEREFORE, plaintiffs pray

A. That a declaratory judgment be entered that patients in public institutions for the mentally disabled are entitled to the recognition, definition, enforcement, and implementation of a constitutional right to adequate care and treatment; and

B. That a declaratory judgment be entered that the entire Titles XVIII and XIX of the Social Security Act of 1935 as amended, be declared unconstitutional on their face or as applied because these statutes exclude the 1,000,000 Americans treated annually in our public mental institutions from their benefits and preliminary and permanent injunctions be entered enjoining the defendant, Richardson, and his agents from paying any money to any person under the said statutes;

or, in the alternative, that a declaratory judgment be entered declaring unconstitutional only the sections of Titles XVIII and XIX of the Social Security Act of 1935, as amended, that exclude the 1,000,000 Americans treated annually in our public mental institutions from their benefits, and preliminary and permanent injunctions be entered enjoining the defendant, Richardson, and his agents from refusing to pay benefits under these Titles for the said 1,000,000 Americans, and that these said benefits be paid to state officials only if these additional and new federal benefits are specifically appropriated by the specific states to improve the care and treatment in their public mental institutions because the plaintiffs are uniquely helpless and disabled and cannot plead their own cause; and,

C. That defendants Rockefeller and Miller be enjoined from refusing to apply for these additional federal funds when granted, and

That defendants Rockefeller and Miller be enjoined from refusing to allot these additional federal funds solely for the improvement of care and treatment in New York public mental institutions, and

That defendants Rockefeller and Miller be enjoined from refusing to allot payments received directly from patients in New York public mental institutions or from other third-party sources on the patients' behalf, solely for the improvement of care and treatment in New York public mental institutions, and

That defendants Rockefeller and Miller be enjoined from proposing a decrease in state appropriations from their present inadequate levels; and

D. For reasonable attorneys' fees, damages, and costs in this matter and such other, further and different relief as may be appropriate.

Brooklyn, New York Dated: November 14, 1972

Respectfully submitted,

Morton Birnbaum

Attorney for Plaintiffs

225 Tompkins Avenue

Brooklyn, New York 11216

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN LEGION, et al.,

Plaintiffs,

ELLIOT RICHARDSON, et al.,

Defendants.

AMENDED COMPLAINT

MORTON DIRNBAUM
COUNSELOR AT LAW
225 TOMPKINS AVENUE
BROOKLYN. N. Y. 11216

1) 6

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

WALTER WOE, et al.,

Plaintiffs,

- v. -

File No. 75 C 1029 (ERN)

F. DAVID MATHEWS, et al.,

Defendants.

# ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the annexed affidavit of Morton Birnbaum, duly sworn to November 14, 1974, and upon all the papers heretofore filed and all the proceedings heretofore had herein, and it appearing to the Court that there are good and sufficient reasons to bring on this motion by order to show cause,

Let the defendants, and each of them, show cause before this Court at Room \_\_\_\_\_, United States Courthouse,

225 Cadman Plaza East, Brooklyn, New York 11201, at \_\_\_\_\_,
on the \_\_\_\_\_ day of November, 1975, or as soon thereafter as counsel may be heard, why an order should not be entered:

- I. Allowing plaintiffs to further amend their amended complaint to include additional claims of jurisdiction; joining additional defendants; adding further allegations to their original three claims for relief; and, adding an additional and fourth claim for relief;
- II. Directing the United States Marshal for this District to serve any necessary new summons, and a copy of the amended complaint and of this order upon the additional defendants without any fee;

Appendix E-1

Certifying this matter as a class action as to Woe and his class, the involuntarily civilly committed state mental hospital patient; IV. Preliminarily enjoining the defendant, F. David Mathews, the Secretary of the United States Department of Health, Education and Welfare, and any agent, from sending any letter or other notice to any involuntarily civilly committed patient in a state mental hospital containing words to the effect that it is the federal plan to cease from any further direct payment to said inmate under Title XVI, §1611 (e) (1) (B), of the Social Security Act of 1935, as amended, due to fact that the said institution is no longer accredited by the Joint Commission on Accreditation of Hospitals; and, therefore, the said institution is no longer eligible to be an institution approved under Title XIX of the Social Security Act of 1935, as amended; and, it is further ORDERED, that pending the hearing and determination of this motion for a preliminary injunction, the defendant, Mathews, and his agents are temporarily restrained from taking any such action set forth in paragraph IV, supra, and, it is further ORDERED, that a copy of this order and of the papers upon which it is based upon attorneys for the defendants on or before November \_\_\_\_, 1975, at 4 P.M., be deemed good and sufficient service, and it is further ORDERED, that the defendants' opposing papers be served upon the plaintiffs attorneys on or before November \_\_\_\_, 1975, at \_\_\_\_\_. Dated: Brooklyn, New York November 17, 1975 U.S.D.J.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK WALTER WOE, et al., Plaintiffs, - v. -Civil Action 75 C 1029 (ERN) F. DAVID MATHEWS, et al., Defendants. AFFIDAVIT STATE OF NEW YORK SS.: COUNTY OF KINGS MORTON BIRNBAUM, being duly sworn, deposes and says that: I am one of the co-counsel for plaintiffs and submit this affidavit in support of this motion for the following: An order allowing plaintiffs A. to further amend their amended complaint to include additional claims of jurisdiction; to join additional defendants; to add further allegations to their original three claims for relief; and, to add an additional and fourth claim for relief; B. An order directing the United States Marshal for this District to serve any necessary new summons, and a copy of the amended complaint and of this order upon the additional defendants without any fee; C. An order certifying this matter as to Woe and his class, the involuntarily civilly committed state mental hospital patient, to be a class action; 1

2

- An order directing the federal defendant,

  F. David Mathews, the Secretary of the United States Department
  of Health, Education and Welfare, and any agent, not to send
  any letter or other notice to any involuntarily civilly committed patient in a state mental hospital stating that it is
  the federal plan to cease from any further direct payment to
  said inmate under Title XVI of the Social Security Act of 1935,
  as amended, because the said institution is not accredited by
  the Joint Commission on Accreditation of Hospitals;
- E. An order temporarily restraining the defendant, Mathews, and any agent, from taking any such action described in paragraph I (D), supra, until the hearing and determination by this Court of the said motion;
- F. For such other relief as to this Court may seem just and proper.

# AS TO ADDITIONAL CLAIM OF JURISDICTION

of the amended complaint to include claims under Title XVI, Section 1611, of the Social Security Act of 1935, as amended; and, under the United Nations Charter, Articles 1,2, 55 and 56, 59 Stat. 1035, et seq.

# AS TO JOINING OF ADDITIONAL DEFENDANTS

- III. Plaintiffs move to amend paragraph IX of the amended complaint to join the following additional defendants:
- A. Morton Wallach, M.D. is the Director of Brooklyn State Hospital, and in that capacity has the overall responsibility for the care and treatment received by the plaintiff, Woe. Dr. Wallach is sued in that capacity, and as representative of that class consisting of all other directors of New York state mental hospitals;

B. Maurice Steinberg, M.D. is the Director of the In-Patient Psychiatric Service of Downstate Medical Center. He is sued in that capacity and as representative of that class consisting of those directors of in-patient psychiatric services of those general hospitals - whether governmentally, voluntarily or privately controlled - who arbitrarily refuse to admit the involuntarily civilly committed mentally ill patient;

C. Robert Dickes, M.D. is the Chairman of the Department of Psychiatry at Downstate Medical Center. He is sued in that capacity, and as representative of that class consisting of the Chairmen of the Department of Psychiatry of American medical schools that arbitrarily refuse to admit the involuntarily civilly committed to the in-patient psychiatric services of the general hospitals under their control and direction;

D. Thomas: Szacz, M.D. is a Professor of Fsychiatry at Upstate Medical Center. He is sued in that capacity, and as representative of psychiatrists on the staff of general hospital in-patient psychiatric units who refuse to admit and treat the involuntarily civilly committed in these units; who condemn the state mental hospital psychiatrist who admits and treats the involuntarily civilly committed; but, who refuse to go to the said state mental hospital and routinely sign out the said involuntarily civilly committed patient - which Dr. Szacz and his class have the legal power to do as qualified psychiatrists under state law - and then have this former state mental hospital patient routinely admitted as a voluntary patient in the general hospital in-patient psychiatric unit.

- E. Anthony J. DiGiovanna is a Justice of the Supreme Court of the State of New York, in and for the County of Kings. He is sued in that capacity, and as a representative of the class consisting of all the judges in the State of New York who have the power to, and do, supervise and order the involuntary civil commitment of the mentally ill;
- Mental Health Information Service of the State of New York, in and for the Second Appellate Division. He is sued in that capacity, and as representative of that class of legal groups formed to protect the legal rights of state mental hospital patients, but who, in fact, concern themselves only with the legality of who and how one can be involuntarily civilly committed and do not concern themselves with the question of quality and quantity of care and treatment received in New York state mental hospitals upon being so committed;
- G. Bernice Bernstein is the Regional Commissioner of the United States Department of Health, Education and Welfare for Region II, which includes New York. In that capacity, she has been delegated overall responsibility for administration of all federal programs under the Social Security Act of 1935, as amended, for this region.
- Chapter President, Civil Service Employees Association, and is a non-professional employee at Brooklyn State Hospital. She is sued in both these capacities, and as representative of two separate classes the non-professional employees in New York state mental hospitals, and the members of the said union employed in New York state mental hospitals.

Plaintiffs claim that both the original defendants and the proposed defendants violate the plaintiffs' civil rights both under the United States Constitution and the United Nations Charter. Several of the above defendants are being sued in their representative: capacities because of the impracticality of bringing all members of their classes before this Court. The questions of law and fact are common to the entire classes of said defendants, and the named defendants will fairly and adequately protect the interests of said classes as required by Rule 23, F.R.C.P. AS TO ADDITIONAL AND FURTHER ALLEGATIONS IN THE PLAINTIFFS' ORIGINAL THREE CLAIMS FOR RELIEF IV. Plaintiffs move to add the following allegations to each of their three present claims for relief: Plaintiffs allege that each and every time that they claim that the defendants violate the constitutional rights of the plaintiffs under the equal protectiondue process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the plaintiffs should be considered as also claiming that the defendants are violating the plaintiffs' rights under the United Nations Charter, in particular, but not limited to, Articles 1,2, 55 and 56. In support of this motion, plaintiffs cite Oyama v. California, 332 U.S. 633, 649-50, 673 wherein Justices Murphy, Rutledge, Black and Douglas support the plaintiffs'position.

# V. Plaintiffs move to add the following allegations to their amended complaint so as to constitute a fourth and separate claim for relief against the federal defendants. A. Under Title XVI of the Social Security Act of 1935, as amended, usually known as the Supplemental Security Income Program, or SSI, very poor and permanently disabled persons such as the plaintiff, Wlater Woe, while in the community receive a direct

B. Upon being involuntarily institutionalized in Brooklyn State Hospital, Woe lost all his Title XVI (SSI) Social Security benefits for food, clothing and shelter, and all his Title XIX (Medicaid) benefits for health care.

Medicaid. SSI was enacted in 1972. Medicaid was enacted

monthly federal grant for food, clothing, shelter and

automatically entitled to indirectly paid for federal

personal items. These SSI beneficiaries are also

health care benefits under Title XIX of the Social

Security Act of 1935, as amended, usually known as

in 1965.

The sole remaining benefit is that under §1611 (e) (1) (B) of Title XVI, Woe receives a direct federal grant of not more than \$25.00 a month for personal items. This direct payment is given to Woe because it is recognized that Woe is very poor and has no other funds to purchase these essential personal items while in the state institution. The federal government, therefore, has recognized that the state institution supplies neither these funds nor these personal items.

Accordingly, the federal government pays this moncy directly to the inmate because it recognized that these personal items are essential for the proper social well-being and rehabilitation of the inmate while he is being institutionalized. Woe can use his money to purchase toilet articles, a newspaper, cigarettes, sodas, stationery, stamps, cans of food to supplement an inadequate institutional diet, an article of clothing to change from the institutional wardrobe, or to make a telephone call to family or friends, etc.

Apparently, the federal government has recognized that any realistic implementation of the concept of "a right to treatment" includes social rehabilitation, e.g. availability and utilization of these personal items, as well as the theoretically available medical rehabilitation.

during the week of November 17, 1975, it is the announced intention of the agents of the defendant, Mathews, to send an obviously distressing and disturbing letter — a federal "Thanksgiving message" — to thousands of severely mentally ill and very poor inmates of New York state mental institutions.

This federal "Thanksgiving message" will announce to these very poor, severely emotionally disturbed and often uncomprehending patients that immediately following the Christmas season, 1975, the federal government intends to deprive them of their \$25.00 a month SSI grant for personal items.

As a result of this latest "enlightened" move the federal government has announced that it intends to deprive certain members of Woe's class - the involuntarily civilly committed state mental hospital patient - of all the Title XVI (SSI) benefits for food, clothing, shelter and personal items, and all the Title XIX (Medicaid)

benefits that the class received while in the community.

message" is a result of Pilgrim State Hospital, a New York state mental hospital located in Suffolk County, and which is both the largest New York state mental hospital, and the largest mental hospital in the world, with over 6,000 patients, and Creedmoor State Hospital, a New York state mental hospital located in Queens County, with over 3,000 patients, both having deservedly and expectedly lost their previously undeserved accreditation as a psychiatric facility by the Joint Commission on Accreditation of Hospitals. This Commission is a private and nongovernmental inspection group set up by various medical groups to achieve minimally adequate hospital facilities.

The loss of accreditation is not unexpected in view of the \$25.00 a day custodial level of care routinely given to these inmates — a level of inadequate and custodial care that the federal and state defendants have, in effect, asked this Court to approve, ratify and defend by granting their motions to dismiss the amended complaint.

As a result of the loss of accreditation, agents of the defendant, Mathews, have determined that these unaccredited state institutions can no longer be considered to be part of an approved state plan under Title XIX of the Social Security Act of 1935, as amended. Accordingly, patients in these institutions will no longer receive direct \$25.00 a month federal grants under Title XVI, \$ 1611 (e) (1) (B).

The annexed copy of an article from the New York

Times of November 8, 1975, page 31, column 7, proves that

the federal defendants plan to pursue this invidious course.

Furthermore, on November 11, 1975, in a telephone conversation

between Morton Birnbaum, Esq., co-counsel for plaintiffs and

Denald Lansdowne, Action Regional Commissioner, Region
II (which includes New York), Social Security Administration,
it was disclosed that these letters will be mailed before
Thanskgiving.

E. It is important for the Court not to overlook the true significance of these latest disclosures.

At present, more than 60% of the state mental hospital beds within the jurisdiction of this Court are unaccredited - an unenviable high for the nation.

Furthermore, it is to be expected that upon the completion of the accreditation inspections and evaluations of Brooklyn State Hospital and Kings Park State Hospital by the end of this year, almost 100% of the state mental hospital beds within the jurisdiction of this Court will have lost their accreditation.

The state and federal defendants because of the sanism of our society, and because of the strong support by our courts, do not hesitate, however, to ask this Court to declare that this continuing and deteriorating pattern of custodial, inadequate and often inhumane care be declared as just, rational and constitutional under the equal protection-due process requirements of the Constitution.

The issue before the Court set forth in this claim for relief as to the constitutionality of the federal plan to deprive members of Woe's class of their \$25.00 a month federal grant is therefore, only the tip of the iceberg of the entire invidious federal plan that deprives Woe and his class - the involuntarily civilly committed state mental hospital patient - of adequate food, clothing and shelter under Title XVI (SSI), and of adequate

# EDITOR'S NOTE

Pages 10 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

H. Plaintiffs request, therefore, that a declaratory judgment be entered that the direct \$25.00 a month benefit that is paid directly to an involuntarily civilly committed state mental hospital patient pursuant to \$1611 of Title 16 of the Social Security Act of 1935, as amended, cannot be denied to the said inmate solely because he has been so involuntarily civilly committed to an unaccredited state mental hospital.

VI. There is no need for the plaintiffs to wait until after the federal defendants have sent their inhumane "Thanksgiving message" to these unfortunate inmates before asking this Court to act.

First, this letter can only result in irreparable harm to these emotionally distrubed inmates. This irreparable harm warrants this court protecting Woe and his class - the involuntarily civilly committed state mental hospital patient - by means of a temporary restraining order and then a preliminary injunction until the declaratory judgment is entered.

Second, there is no real and substantial issue of fact herein. It is solely a question of first instance under the United States Constitution and the United Nations Charter. Accordingly, there is no need for a prior ruling by an administrative official as to the legality under the Constitution and the Charter of Congress invidiously denying only to the involuntarily civilly committed inmate of an unaccredited state mental institution the \$25.00 a month direct federal grant under Title 16, \$1611 of the Social Security Act of 1935, as amended.

Morton BirnBaum Morton BirnBaum Morton Benchan

Sworn to before me this 14th

day of November, 1975.

. .

11

THE NEW YORK TIMES, SATURDAY, NOVEMBER 8, 1976 Page 31, col. 7.

# Mental Centers in Jersey And L.I. to Lose U.S. Aid

# By ALFONSO A. NARVAEZ

The United States Depart funds because of loss of acment of Health, Education and creditation, a spokesman for Welfare has notified two major the Department of Health, Education and Welfare said. The Pilgrim Center was notified on Oct. 30 that about \$21 million in Medicaid and Medicare payments will cease by the end of the year because they do not meet the required standards of medical care.

The centers are the Trenton Psychiatric Center in New Jersey and the Pilgrim Psychiatric Center in New Jersey and the Pilgrim Psychiatric Center in West Brentwood, L. I. both of which had lost accreditation as psychiatric hospitals.

The regional office of the Department of Health, Education and Welfare in New York hotified state officials in Trenton and Welfare in New York hotified state officials in Trenton that about \$2 million in Medicaid and Medicare reimpursement for care provided to patlents at the Trenton center would cease by Dec. 21 Jecause of loss of accreditation.

Agency Sets Standards

The standards for accreditation are set by the Joint Com-

tion are set by the Joint Com-primbursements upon the acmission on Accreditation of creditation of a private agency emhospitals, a private agency emnumber of the country of the country of the country. The commission found that the Trenton
facility did not provide adequate patient care or privacy
and that it did not meet environmental standards act by the to year.

A spokesman for the accredit live the factories redeend

mental standards act by the commission.

A spokesman for the accoditation Commission, which is a program to aid the clierty, based in Chicago, said that about 3,000 hospitals are surveyed each year and that about percent by the state and 50 percent of the regular hospitals and 7 percent of the psychiatric institutions do not qualify for accreditation. There are about 7,000 hospitals in the country, 5,300 of which apply to the commission for accreditation, and about 500 psychiatric institutions.

The two institutions in the metropolitan area were the first to upgrade facilities, in order to first to upgrade facilities, in order to the country large state and sopropolitan area were the first to upgrade facilities, in order to the state and sopropolitan area were the first to upgrade facilities, in order to the state and sopropolitan area were the first to upgrade facilities, in order to

The standards for accredita- a law that predicates Federal tion are set by the Joint Com-reimbursements upon the ac-

Charles the state of the state

metropolitan area were the first to upgrade facilities, in order to in the country to lose Federal obtain accreditation.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

WALTER WOE, et al.,

Plaintiffs,

- V. -

E. DAVID MATHEWS, et al.,

Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

MORTON BIRNBAUM COUNSELOR AT LAW 225 TOMPKINS AVENUE BROOKLYN, N. Y. 11216

UNITED STATES DISTRICT COURT EASTERN DISTRICT, OF, NEW YORK WALTER WOE, et al., Plaintiffa, File No. 75 Civ. 1029 (ERN) F. DAVID MATHEWS, et al., NOTICE OF MOTION Defendants. SIRS: PLEASE TAKE NOTICE that upon the annexed affidavit of Morton Birnbaum, co-counsel for plaintiffs, duly verified December 6, 1975, and upon all the papers heretofore filed, and all the proceedings hertofore had herein, Plaintiffs will move before this Court, at Room 2, United States Courthouse, 225 Cadman Plaza East. Brooklyn, New York 11201, on the 19th day of December, 1975, at 10 A.M., or as soon thereafter as counsel can be heard, for an order granting the following relief: Allowing plainciffs to further amend their amended complaint to join as additional defendants, George Goe and Harry Hoe (both pseudonyms); to join as additional defendants, John D. Porterfield, M.D., Joseph St. Louis, "John Doe" (a pseudonym), "Jane Doe," (a pseudonym) and, the Joint Commission on Accreditation of Hospitals; to add additional allegations to their five prior claims for relief, and to add an additional sixth claim for relief; II. Certifying the claims of Frank Foe, George Goe and Harry Hoe, and those similarly situated as a sub-class herein pursuant to Rule 23 F.R.C.P.;

Ordering the United States Marshal for this District to serve additional papers upon the request of plaintiffs' counsel; and, For such other relief as this Court may seem just and proper. Dated: Brooklyn, New York December 8, 1975 Yours, etc. MORTON BIRNBAUM Co-counsel for Plaintiffs 225 Tompkins Avenue Brooklyn, New York 11216 TO: CLERK ... United States District Court Eastern District of New York

United States Court House Brooklyn, New York 11201

> LOUIS J. LEFKOWITZ, ESQ. Attorney for State Defendants Two World Trade Center New York, New York 10047

Att.: RALPH McMURRY, ESQ.

DAVID TRAGER, ESQ. Attorney for Federal Defendants United States Court House Brooklyn, New York 11201

Att.: CYRIL HYMAN, ESQ.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK WALTER WOE, et al., Plaintiffs, File No. 75 Civ. 1029 (ERN) - v. -F. DAVID MATHEWS, et al., AFFIDAVIT AND BRIEF Defendants. STATE OF NEW YORK SS.: COUNTY OF KINGS MORTON BIRNBAUM, being duly sworn, deposes and says, that: I am co-counsel for plaintiffs and submit this affidavit in support of plaintiffs' application for an order granting the following relief: Allowing plaintiffs to further amend their amended complaint as follows: 1. To join as additional plaintiffs, George Goe and Harry Hoe, (both pseudonyms), both of them being similarly situated to Frank Foe; 2. To join as additional defendants, John D. Porterfield, M.D., individually, and as Executive Director, Joint Commission on Accreditation of Hospitals; Joseph St. Louis, individually, and as Director, Psychiatric Hospitals Division, Joint Commission on Accreditation of Hospitals; "John Doe" and "Jane Doe," (true names not known to plaintiffs), individually, and as regional representatives of the Joint Commission on Accreditation of Hospitals; and, the Joint Commission on Accreditation of Hospitals; and,

3. To add allegations to their prior claims for relief concerning the conspiracy entered into between the state defendants and the Joint Commission and its agents; between the federal defendants and the Joint Commission and its agents; and, among the federal and state defendants and the Joint Commission and its agents to deprive the plaintiffs of their constitutional and other legal rights; В. Certifying the claims of Foe, Goe and Hoe (all pseudonyms), and those similarly situated, as a sub-class herein; and, Ordering the United States Marshal for this District, upon the request of plaintiffs' counsel, to serve supplemental or new summonses, copies of the original amended complaint, copies of this affidavit, and

AS TO JOINING ADDITIONAL PLAINTIFFS, GEORGE GOE AND HARRY HOE

copies of the Court's order upon each of the additional

defendants

II. The proposed new plaintiffs, George Goe and Harry Hoe, are similarly situated to the plaintiffs, Frank Foe. All three are very poor; are over 65; are severely mentally ill; are long-term patients at Pilgrim State Hospital, and probably will spend their remaining years there; and all have been involuntarily civlly committed.

All are in danger of losing their \$25.00 a month, or less, direct federal payment for personal items under the Supplemental Security Income program(SSI), established by Title XVI of the Social Security act of 1935, as amended, solely because the hospital is no longer accredited by the Joint Commission on Accreditation of Hospitals.

All continue to suffer continuing irreparable damage because every day, these penniless unfortunates do not know if their present monthly payment will be the last money that they will receive for the rest of their lives. Additional plaintiffs, Goe and Hoe, will be able to present further proof in support of the claims of their class. With the submission of this application III. to the Court, counsel will present an ex partecapplication to the Court to allow these additional proposed plaintiffs tooproceed under pseudonyms with their true names known only to counsel for the parties herein. AS TO THE NAMING AND THE DESCRIPTION OF THE ADDITIONAL DEFENDANTS IV. John D. Porterfield, M.D., is

the Executive Director of the Joint Commission on Accreditation of Hospitals. In this capacity, he is responsible for, and supervises, all the inspection and evaluation activities of the Joint Commission.

Joseph St. Louis, is the Director of the Psychiatric Hospitals Division of the Joint Commission on Accreditation of Hospitals. In this cpapacity, he is responsible for, and supervises all the inspection and evaluation activities of this particular division.

"John Doe" and "Jane Doe" pseudonyms are being used for the regional representatives of the Joint Commission, as their true names are not known to the plaintiffs. The Joint Commision is located in Chicago,

٥

Illinois. Its regional representatives are constantly changing as these personnel constantly travel about the country inspecting various facilities.

D. The Joint Commission on Accreditation of Hospitals is a private non-governmental group established by various medical groups for the ostensible purpose of establishing minimum standards for adequate hospital care; for a substantial fee, to offer to inspect and survey hospitals to see if they meet these standards for minimum adequacy; and, to approve or accredit those hospitals that have volunteered to be inspected and surveyed, that have paid this substantial fee, and that have met these standards.

AS TO THE ADDITIONAL ALLEGATIONS TO THE PRIOR CLAUMS FOR

AS TO THE ADDITIONAL ALLEGATIONS TO THE PRIOR CLAIMS FOR RELIEF, AND AS AN ADDITIONAL SIXTH CLAIM FOR RELIEF, CONCERNING THE CONSPIRACIES BETWEEN THE STATE DEFENDANTS AND THE AGENTS OF THE JOINT COMMISSION, BETWEEN THE FEDERAL DEFENDANTS AND THE JOINT COMMISSION'S AGENTS, AND AMONG THE STATE AND FEDERAL DEFENDANTS AND THE JOINT COMMISSION'S AGENTS TO DEPRIVE THE PLAINTIFFS OF THEIR CONSTITUTIONAL AND OTHER LEGAL RIGHTS.

# SIXTH CLAIM FOR RELIEF

V. Plaintiffs are the sickest, the poorest and the oldest among all the very sick and socially disadvantaged who constitute our nation's state mental hospital patients.

All receive inadequate and custodial care in separate, unequal and inferior lower tier state mental institutions.

They have been involuntarily civilly committed to these institutions under remedial and loosely construed substantive and procedural mental hospitalization laws, and not under penal and strictly construed penal laws. They have been so committed solely because the state has successfuly contended that they need adequate and active care in a mental hospital, and that they cannot receive this care in the community.

A

De facto, because they are involuntarily civilly committed, they are institutionalized only in the state mental institution, and not in the superior, unequal and superior non-state mental hospital facility wherein they would routinely receive adequate and active care. In the state institution, because they are longterm inmates, the total cost of their care per diem is far less than the \$25.00 a day average cost of care in the New York state mental hospitals. It is accordingly far, far, far less than the \$250.00 a day average cost of care in non-state mental hospitals located in New York. Until recently, the Joint Commission of Accreditation of Hospitals has approved and accredited all the separate, unequal and inferior lower tier state mental hospitals located in this state, even though they have been providing at the most a \$25.00 a day level of inadequate and custodial care. Simultaneously, the Joint Commission has approved and accredited all the separate, unequal and superior upper tier non-state mental hospital facilities in this state. This was to be expected due to the fact that they routinely provide adequate and active care at a minimum

cost of \$250.00 a day.

The Joint Commission, therefore, has supported the sanist invidious providing by the state defendants of inadequate and custodial care to the sicker and more socially disadvantaged involuntarily civilly committed state mental hospital patient.

IX. Throughout the state, and indeed throughout the nation, in no other area of hospital care, e.g. medicine, surgery, pediatrics and obstetrics, is there any significant difference between Joint Commission standards and accreditation of public hospital care and non-public hospital care. In order for these other areas of hospital care to be accredited, it is required that the patient receive minimally adequate and active care.

It is only in the area of mental hospital care that the Joint Commission has followed an invidious sanist policy of establishing <u>de facto</u> a lower standard of care for the state mental hospital patient than for the non-state mental hospital patient.

X. It is only the question of whetheroor not a hospital is accredited by the Joint Commission that is objective. For the standards for psychiatric facilities of the Joint Commission do not contain any objective standards as to minimum staffing, quality of staff, frequency of visits, etc. See, Birnbaum, M.:

Some Remarks on "The Right to Treatment," 23 ALA. L. REV. 623, (628 (1971)

The standards of the Joint Commission, therefore, are subjective, and easily susceptible of an invidious sanist interpretation.

XI. Plaintiffs claim that these actions constitute an illegal conspiracy among the state defendants and the agents of the Joint commission.

This conspiracy has resulted in the plaintiffs being deprived of their civil rights as protected by the Fourteenth Amendment to the United States Constitution

and, therefore, violate 42 U.S.C. §§ 1981, 1983 and 1985. Sec, Birnbaum.v. Trussel, 371 F2d 672 (1966).

Furthermore, the actions of the state and Joint Commission co-conspirators have violated other legal rights of the plaintiffs and constitute, inter alia, prima facie torts against the plaintiffs. Plaintiffs are, therefore, entitled to injunctive relief, compensatory and punitive damages of \$10,000.00 against each state and Joint Commission defendant, attorneys' fees, costs, and other relief.

AS TO CONSPIRACY AMONG FEDERAL DEFENDANTS, AND STATE DEFENDANTS AND AGENTS OF JOINT COMMISSION

XII. With this background, it is invidious for Congress to say that benefits to state mental hospital patients-whether they be the direct payments under the Supplemental Security Income program (SSI), Title XVI of the Social Security Act of 1935, as amended, or the indirect reimbursements to the states under Medicare or Medicaid, Titles XVIII and XIX, respectively, of the said Social Security Act. - have as a primary condition precedent the granting of accreditation by the Joint Commission.

XIII. Plaintiffs contend that as the state mental hospital system invariably provides inadequate custodial care, it invariably should not be accredited by the Joint Commission or approved as a Title XVIII-XIX (Medicare Medicaid) facility by the Social Security Administration.

XIV. The Joint Commission has irrationally condoned for the state mental hospital patient what it would have condemned for the non-state mental hospital patient.

The Joint Commission has approved and supported, for a fee, the providing of inadequate and custodial care only, de facto, to the sicker and more socially disadvantaged involuntarily civilly committed state mental hospital patient. Furthermore, the state defendants, the federal defendants and the agents of the Joint Commission are all aware that NO FEDERAL REIMBURSEMENT PAYMENT UNDER EITHER MEDICAID OR MEDICARE GOES DIRECTLY TO ANY STATE MENTAL HOSPITAL. These federal reimbursement funds go only either to the general funds of New York State or to almost totally non-state mental hospital funds because there is no effective Maintenance of Effort provision applicable to state mental hospitals in any national health plan. In fact, due to inflation, the real expenditure per patient in New York state mental hospitals has decreased since Medicare and Medicaid was enacted even for those theoretically benefitted, i.e. those under 21 and over 65 years of age. THERE IS NO MAINTENANCE OF EFFORT REQUIREMENT IN MEDICAID THAT EFFECTIVELY REQUIRES THAT MEDICAID REIMBURSEMENT FUNDS BE USED TO IMPROVE THE INADEQUATE CUSTODIAL CARE NOW BEING GIVEN TO STATE MENTAL HOSPITAL PATIENTS: THEREFORE, BOTH A CONSTITUTIONAL RIGHT TO TREATMENT AND A REALISTIC ENFORCEMENT OF JOINT COMMISSION PURPOSES AND GOALS ARE REQUIRED. XVI. The most authoritative comment on how federal reimbursement benefits theoretically intended to improve state mental hospital care are diverted to nonstate mental hospital purposes by invidious conspiracies between the states and the federal government is found in the most exhaustive government study in this area: 8

This report entitled FINANCING MENTAL HEALTH
CARE UNDER MEDICARE AND MEDICAID, Research Report No. 37,
Office of Research and Statistics, Social Security Administration. U.S. Department of Health, Education and Welfare
(June, 1971) states:

# MAINTENANCE OF STATE EFFORT

The Maintenance of State Effort clause in the Social Security Act specifies that Federal funds for aiding aged individuals in psychiatric hospitals should be paid only if a state's total expenditures from federal, state and local sources for mental health services for a quarter, exceed expenditures from such sources for each quarter of fiscal year, 1965. The intent of this was to insure that Medicaid money would provide for expanded or new state mental health services.

Subsequently, most states increased their mental health budgets and met the requirements. In a number of states, however, inflation alone has accounted for much of the increased expenditures, with little or no expansion of services accruing to the patients. . . . (V)endor payments . go into the general state treasury . . . with no equivalent increment reflected in the mental health budget or services of the state. Many of the mental hospitals providing service to Medicaid recipients are required to function within their pre-established yearly allocations, regardless of the magnitude of Medicaid reimbursable claims." (33)

# THE CONSPIRACY AMONG STATE, FEDERAL AND JOINT COMMISSION DEFENDANTS

XVII. It is undisputed that for \$25.00 a day the state defendants provide only constitutionally and common law inadequate custodial care and treatment to the plaintiffs. This care is provided to these involuntarily civilly committed inmates only in separate, unequal and inferior state mental hospitals. This invidious situation results from the sanism of the defendants and our society.

The Joint Commission defendants approve and accredit, for a fee, this invidious sanist two tier system of mental hospital care.

The federal defendants aware of this invidious sanist system of two-tier mental hospital care; and, aware of this irrational accreditation of these invariably inferior state mental institutions by the Joint Commission in violation of the Joint Commission's duties to these patients; then proceed to grant the state defendants substantial Medicaid funds based upon this irrational accreditation, and specifically allow: - in the Medicaid statute - that these funds can be, and invariably are, totally diverted into the general state funds from where they are further diverted to almost total non-state mental hospital purposes.

This constitutes a continuing conspiracy to further violate the plaintiffs' civil rights as protected by the Fourteenth Amendment to the United States Constitution.

See, Kletschka v. Driver, 411 F2d 436 (1969). It also constitutes a conspiracy to violate other legal rights of the plaintiffs, e.g. protection against the commission of prima facie toxts. Patients-plaintiffs are therefore entitled to injunctive relief, damages, attorneys' fees, costs and other relief.

wherefore, under Rule 15, F.R.C.P. liberal 20, amendment of the complaint is allowed, and under Rule 20, F.R.C.P., liberal permissive joinder is allowed; and, as no defendant is prejudiced by granting the requested relief at this stage of this lawsuit - defendants have only filed a motion to dismiss, plaintiffs' motions to join additional parties, amend their complaint and have a class action certification should be granted.

MORTON BIRNBAUM

Sworn to before me this 6th day of December, 1975

SANFORD ORLOFF
NOTARY PUCLIC, STATE OF NEW YORK
No. 24-2972575
Qualified in Kings County

Commission Expires March 30, 1972

10

File No. 75 Civ. 1029 (EPN)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

WALTER WOE, et al.,
Plaintiffs,

- V. -

F. DAVID MATHEWS, et al.,
Defendants.

MOTION TO FURTHER AMEND AMENDED COMPLAINT, etc.

MORTON BIRNDAUM COUNSELOR AT LAW 225 TOMPKINS AVENUE BROOKLYN, N. Y. 11216

RECEIVED U. S. ATTER VET

DEC 8 4 25 PH '75 EAST. DIST. N. Y.

Row Lift out